Yellow Enterprise Systems, Inc., d/b/a Yellow Ambulance Service *and* Professional EMTs & Paramedics, a Division of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL–CIO. Cases 25–CA–26494, 25–CA–26532, 25–CA–26605, 25–CA–26605–2, and 25–CA–26605–3

August 17, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On February 25, 2000, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent, the General Counsel, and the Charging Party each filed exceptions and a supporting brief. The General Counsel and the Charging party filed answering briefs to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order.

I. INTRODUCTION

The judge found that the Respondent committed numerous unfair labor practices during and after a union organizing campaign among its employees at its Owensboro, Kentucky ambulance service, which resulted in the Charging Party being certified as the employees' bargaining representative on April 6, 1999. The Respondent argues only that the judge erroneously found that it unlawfully disciplined, discharged, or constructively discharged four employees—Renee McKinney, Roger Brumley, Brian Kendall, and Vicky Belcher. The General Counsel argues that the judge erred in dismissing certain complaint allegations and in failing to provide certain employees with appropriate make-whole relief. The Charging Party argues only that the judge erroneously failed to order the Respondent's president or director to read aloud the Board's notice to employees.

We have carefully considered all of the parties' exceptions. In doing so we recognize that, as a rule, in applying the Board's *Wright Line*[3] analysis, "decision as to the actual motive depends principally upon an evaluation of a body of circumstantial evidence." *Reeves Distribution Service*, 223 NLRB 995, 998 (1976). The latter may include a related violation committed by a respondent. See *Howard's Sheet Metal, Inc.*, 333 NLRB 361 (2001) (discriminatory discharge of one worker a factor to consider in weighing whether the contemporaneous discharge of a second coworker, who engaged at the same time in the same prounion activity, was discriminatory). Considering all the circumstances here, we reject the Respondent's exceptions to the judge's findings of violations involving employees McKinney, Brumley, and Kendall.[4] However, we find merit in the Respondent's exception concerning the alleged constructive discharge of employee Belcher. We also find merit in certain of the General Counsel's exceptions, as detailed below, but we reject the Charging Party's contention that the Respondent's owner or director should be required to read aloud the Board's notice to employees.

II. THE RESPONDENT'S EXCEPTIONS

A. The Discipline and Discharges of McKinney and Brumley

Our analysis of the Respondent's alleged unlawful discipline and discharge of McKinney and Brumley is governed by the test articulated by the Board in *Wright Line*, supra. Under that test, a violation is established where the General Counsel shows that an employer's opposition to Section 7 activity was a substantial or motivating factor in its decision to discipline an employee, unless the employer proves, as an affirmative defense, that it would have imposed the same discipline even in the absence of the employee's union activity. To establish this affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), enfd. 99 F.3d 1139 (6th Cir. 1996).

1. Renee McKinney

The judge found that the Respondent violated Section 8(a)(3) and (1) by issuing McKinney two written disci-

[1] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Respondent has excepted only to the judge's finding that it violated Sec. 8(a)(3) and (1) by disciplining or discharging employees Renee McKinney, Roger Brumley, Brian Kendall, and Vicky Belcher. In the absence of Exceptions, we adopt all of the judge's many additional unfair labor practice findings.

[3] *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[4] Several of the Respondent's many unexcepted to violations directly affected alleged discriminatees McKinney, Brumley, and Kendall.

plinary warnings and discharging her on February 23, 1999—1 day prior to the representation election. The judge found that McKinney engaged in union activity, that the Respondent was aware of McKinney's union activity, and that this union activity was a motivating factor in the Respondent's decision to discipline and discharge her on February 23. In so finding, the judge rejected the Respondent's claim that it disciplined McKinney because she allegedly left work early on February 20 (at 12:20 p.m. instead of 1 p.m.) and failed to properly notify Supervisor Bruce Nanney that paramedic Danny Wilson had called off for the evening shift.[6] The judge further found that the Respondent failed to establish that it would have imposed the same discipline on McKinney even in the absence of her union activity. Consequently, the judge found that her written warnings and discharge violated Section 8(a)(3) and (1). We agree.

The Respondent contests the judge's finding on three grounds. It first argues that the judge's finding is inconsistent with the claims by company witnesses that McKinney left work early on February 20 and that she lied about receiving permission from Supervisor Lisa Byers to do so. This argument ignores the judge's specific discrediting of the Respondent's witnesses on each of these points. Instead, the judge credited McKinney's testimony that she offered to work on February 20, only until 12 or 1 p.m. and that Byers agreed to this arrangement. As indicated earlier, we have found no basis for overruling the judge's credibility determinations.

The Respondent's second argument is that the judge erroneously failed to consider Director Dinwiddie's claim that McKinney lied to him on February 23 about the reason she had to leave work early on February 20,[7] and that this lie contributed to her discharge. In view of the judge's finding that McKinney did not leave work early on February 20, the Respondent's argument is reduced to a contention that McKinney lied about the reason she offered to work only until 12 or 1 p.m. We find no reversible error in the judge's decision not to expressly consider this alleged lie.

The Respondent failed to establish that it discharged McKinney for this alleged lie, much less that it actually would have discharged her for this alleged lie even in the absence of her union activity. On direct examination, Dinwiddie testified specifically that he discharged McKinney for the "two instances" on February 20: "[s]he deserted her post and she didn't provide for coverage when a paramedic called off, didn't notify a supervisor." Dinwiddie did later testify that he also considered the "lie on her part." That testimony, however, is unsupported by the Respondent's own documentation of the reasons for McKinney's discharge. On February 23, Dinwiddie showed McKinney two written disciplinary forms and an incident report, but none of these documents cited her alleged lie. Moreover, there is no evidence that Dinwiddie mentioned this alleged lie when he informed McKinney on February 23 of the reasons for her discharge, even though Dinwiddie, by his own account, had already concluded in that meeting that she had lied. In these circumstances, we find, in agreement with the judge, that the Respondent discharged McKinney because of her union activity, not her alleged lie to Dinwiddie.

We also find that the Respondent failed to establish that it actually would have discharged McKinney in any event for lying about the reason she could only work until 12 or 1 p.m. As stated, Dinwiddie knew about McKinney's alleged lie prior to discharging her, but neither documented it nor mentioned it on February 23. Moreover, the Respondent presented no evidence that it had consistently discharged employees for similar offenses. The evidence consists solely of the Respondent's after-the-fact, self-serving assertion that it would have discharged McKinney for a reason that it knew about at the time, but never mentioned. This is insufficient to establish the Respondent's affirmative defense.

Finally, the Respondent argues that the judge found McKinney's discharge unlawful based on the judge's view that it was too harsh, thus, improperly substituting his own business judgment for that of the Respondent. Once a discharge has been shown to be unlawfully motivated, an employer must establish not merely that it *could have* discharged the employee for legitimate reasons, but also that it actually *would have* done so, even in the absence of the employee's protected activity. See, e.g., *Structural Component Industries*, 304 NLRB 729, 730 (1991). Here, the judge commented that the Respondent "could have legitimately imposed a lesser form of discipline on McKinney for failing to effectively notify Nanney of Wilson's absence." But this comment does not establish that the judge found that the Respondent *would have* discharged McKinney for the notice infraction alone, much less that the judge nevertheless found a violation simply because he disagreed with the Respondent's choice of discipline. First, the failure to

[6] The judge inadvertently stated that these alleged incidents occurred on February 22. Supervisor Nanney and employee McKinney, however, both testified, and we find, that the events in question occurred on February 20.

[7] McKinney allegedly told Dinwiddie she had to leave work on February 20 to pick up her children from their grandmother's home. The record, however, indicates that McKinney left work when she did because a coworker dropped McKinney's children off at the Owensboro facility. The judge did not determine whether McKinney actually lied to Dinwiddie and we agree that it was unnecessary to do so.

report, by itself, was never the asserted basis for McKinney's discharge. Rather, as the judge found, Dinwiddie claimed that the discharge was based on both of the alleged February 20 incidents; he never claimed that the notice infraction alone was grounds for discharge. Second, the judge's observation merely acknowledged that the notice infraction amounted to misconduct. Understood in this context, it does not demonstrate reliance on a view as to what measure of discipline was proper, as opposed to a determination of the Respondent's actual motive in discharging McKinney.

2. Roger Brumley

The judge found that the Respondent unlawfully discharged Brumley on June 1. Applying *Wright Line*, supra, we agree with the judge that Brumley's prounion activity was a motivating factor in the Respondent's decision to discharge him, and that the Respondent failed to establish that it would have taken the same action even in the absence of that union activity.

The Respondent claimed that it discharged Brumley because he entered the dispatch office—a restricted area—on May 30 without authorization and, also without authorization, retrieved from an office computer his time and mileage data for that day's shift. The judge rejected these claims. He found, based primarily on evidence of the Respondent's disparate treatment of Brumley, that the Respondent's real motivation for discharging Brumley was his union activity. The judge also found that the Respondent failed to establish that it would have discharged Brumley in any event. This conclusion was based largely on the judge's finding that the "Respondent was aware that nonauthorized employees routinely entered the dispatch office and, with the exception of Brumley, apparently didn't discipline anyone for violating its rules." We find no merit in the Respondent's exceptions to these findings.

The Respondent argues that the judge erroneously failed to consider evidence that the Respondent regarded Brumley's alleged offenses as serious and evidence that supported the timing of Brumley's discharge. On the contrary, it is readily apparent that the judge considered, but rejected, the Respondent's argument that it viewed Brumley's actions to be serious offenses. Thus, the judge found that the Respondent never informed employees that use of the dispatch computer to retrieve their times and mileage was a serious offense. And he also found that, notwithstanding the steps the Respondent took to discourage unauthorized entry to the dispatch office, "this rule was never, or almost never, enforced." Indeed, the judge found that employees were constantly receiving a mixed message as, for example, Director Jacobs's November 25, 1998 memorandum telling employees they were permitted to "go into dispatch to get their radio, keys, or other information needed." That memorandum was dated several months after Jacobs had posted a "restricted" sign over the door of the dispatch office. For these reasons, we disagree with the Respondent's contention that the judge improperly discounted the seriousness of Brumley's offenses.

In any event, the Respondent does not contest in its brief the judge's finding of disparate treatment, which we adopt. The Respondent did not discipline Jerry Bradley or Dispatcher Holly Hill, both of whom were in the dispatch office when Brumley entered, even though the Respondent had just issued on March 14 a memorandum warning its dispatchers that any unauthorized access to the dispatch office "will result in disciplinary action [being] given to all employees involved."[8] As a result, even if the judge underestimated the Respondent's concern over Brumley's alleged offenses, we still would find that Brumley's union activity was a motivating factor in his discharge and that the Respondent failed to establish that it would have discharged Brumley even in the absence of his union activity.

As to the timing of Brumley's discharge, the Respondent argues that the judge's finding of a violation is inconsistent with the fact that Brumley's discharge occurred immediately after his misconduct on May 30, and more than 9 months after the Respondent learned of his union activity. The timing of an employee's discharge relative to the employer's becoming aware of his union or protected activity is often a relevant factor, but it is not dispositive. Cf. *NLRB v. Main Street Terrace Care Center*, 218 F.3d 531, 542 (6th Cir. 2000) (evidence that employer had learned of employee's protected activity months prior to her discharge did not undercut Board's finding that employee ultimately was fired for unlawful reasons); *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 66 (2d Cir. 1992) (employer's past indifference to union activity did not preclude a finding that it discriminated against an employee on a particular occasion). We find in the instant case that the arguably "innocent" timing of Brumley's discharge is more than outweighed by the Respondent's obvious disparate treatment of Brumley.

For these reasons, we find no merit in the Respondent's exceptions to the judge's finding that it unlawfully discharged Brumley.

[8] Also, Director Dinwiddie testified that he had repeatedly warned his supervisors and dispatchers that, in the event an unauthorized person used the computer, "they could be subject to disciplinary action as well."

B. Brian Kendall

The judge found that the Respondent violated Section 8(a)(3) and (1) by constructively discharging Kendall on about April 5, by unlawfully switching one of his 8-hour day shifts to an 8-hour overnight shift, and by refusing to rehire him in May. We affirm these findings.

1. The constructive discharge

Prior to March 14, Kendall had worked only day shifts for nearly a year. Beginning with the 3-week schedule commencing March 14, Dinwiddie scheduled Kendall to work one 8-hour overnight shift each week. Kendall immediately asked Dinwiddie to restore his prior schedule. Kendall specifically informed Dinwiddie that he could not work nights due to his childcare responsibilities. Dinwiddie denied Kendall's request, but advised Kendall that he could trade the overnight shifts with other employees. On the 3-week schedule commencing April 4, Dinwiddie again scheduled Kendall to work an 8-hour overnight shift each week. As a result, on April 5, Kendall resigned his full-time position, effective April 9.

The judge properly analyzed these facts under the Board's two-prong test, set forth in *Crystal Princeton Refining*, to determine whether an unlawful constructive discharge occurred:

> First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities.

222 NLRB 1068, 1069 (1976), cited with approval in *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004); see also *Loudon Steel, Inc.*, 340 NLRB 306 (2003). Under the first prong, the "test for intent is not limited to whether the employer specifically intended to cause the employee to quit, but includes whether, under the circumstances, the employer reasonably should have foreseen that its actions would have that result." *American Licorice Co.*, 299 NLRB 145, 148 (1990). The second prong recognizes that a constructive discharge violates Section 8(a)(3) and (1) only if it is implemented because of an employee's union activity. Applying this test, the judge found that the Respondent constructively discharged Kendall because of his union activity. We agree, for the reasons given by the judge.

The Respondent's exceptions, many of which our dissenting colleague endorses, lack merit. The Respondent first argues there never was a change in Kendall's "working conditions" because his job duties remained the same. As the Respondent acknowledges, however, Dinwiddie reassigned Kendall from an 8-hour day shift, which he had been working for almost a year, to an 8-hour overnight shift, beginning March 14. This constituted a change in Kendall's "wages, *hours*, and other terms" of employment (Sec. 8(d) of the Act) sufficient to support the judge's finding. See *American Licorice*, supra, 299 NLRB at 148 (finding an unlawful constructive discharge where the employer assigned an employee to a different shift, even though the employee's duties remained the same); see also *Grand Canyon Mining Co.*, 318 NLRB 748, 760 (1995), enfd. 116 F.3d 1039 (4th Cir. 1997).

The Respondent next argues that, although it changed one of Kendall's day shifts to an overnight shift, this "minor scheduling difference" was too insignificant to support a finding of a constructive discharge. However, the Board has recognized that requiring an employee to choose between working and caring for his children is sufficiently burdensome to support a finding of a constructive discharge. See, e.g., *American Licorice*, supra at 145 (constructive discharge found where employer denied employee's request to transfer to a night shift so she could care for her children during the day); see also, e.g., *Bennett Packaging Co.*, 285 NLRB 602, 603, 607 (1987) (constructive discharge found where employer directed employee to report one hour earlier for work, knowing that employee could not because of childcare requirements).

The Respondent nevertheless insists that the burden imposed on Kendall was not significant because Dinwiddie permitted Kendall to attempt to find other employees to cover his overnight shifts. We reject this argument. As the Charging Party points out, Dinwiddie's offer was a hollow gesture, because, not surprisingly, it was difficult to find another employee to work the overnight shift. Thus, although Kendall was able to trade shifts for a few weeks, his efforts became ineffective by April 5—the date he resigned his full-time position. In these circumstances, we reject the Respondent's argument that the burden imposed on Kendall was a minimal one.[9]

Last, we reject the Respondent's argument that the judge erred in finding that Dinwiddie intended to cause Kendall's resignation. As the judge found, the record shows that Dinwiddie knew, or reasonably should have known, that assigning Kendall to an overnight shift would render him unable to continue working as a full-time employee. Most important, when Dinwiddie posted

[9] We also are not persuaded by the Respondent's attempt to shift the blame to Kendall by suggesting that he "simply did not want to expend the effort to trade the night shifts with other employees." Given the undesirability of the overnight shift, we find that Dinwiddie knew or should have known that Kendall would inevitably be unable to consistently trade away the shift.

the March 14 schedule, Kendall specifically asked Dinwiddie to relieve him of the overnight shift because it conflicted with his childcare responsibilities.[10] Dinwiddie not only refused to alter the schedule but, on the next 3-week schedule beginning April 4, again assigned Kendall to an overnight shift. In light of the judge's now unexcepted to finding that Kendall's March 14 assignment to an overnight shift was unlawful, and the Respondent's failure to offer any persuasive reason why it denied his request to return to the day shift, we see no reason to upset the judge's finding that Dinwiddie intended to cause Kendall's resignation.

As a final matter, it appears that the Respondent has not specifically excepted to the judge's finding, under the second prong of the *Crystal Princeton Refining* test, that Dinwiddie imposed the shift changes on Kendall because of his union activity. In any event, we affirm the judge's finding. Kendall was an open union supporter. As described, the record amply demonstrates both Dinwiddie's hostility to union activity generally and his propensity to act on that hostility to the disadvantage of employees, including Kendall, who engaged in such activity. Indeed, the Respondent has not excepted to the judge's findings that it violated the Act by constructively discharging both employees Cynthia Payne and Norman Byers as a result of knowingly scheduling them for shifts that conflicted with their childcare responsibilities.

For these reasons, we disagree with our dissenting colleague, and we affirm the judge's finding that the Respondent constructively discharged Kendall because of his union activity, in violation of Section 8(a)(3) and (1).

2. The Respondent's refusal to rehire Kendall

As described above, Kendall resigned his full-time position after Dinwiddie again scheduled him to work overnight shifts. Thus, on April 5, Kendall advised Dinwiddie in writing that his last day would be April 9. Kendall worked several weeks for another employer, but, after being laid off by that employer in May, Kendall asked the Respondent to rehire him as a full-time employee. Human Resources Manager McDaniel advised Kendall to complete an application, and he did so. Kendall then arranged an interview with Dinwiddie, but Dinwiddie cancelled the interview and did not reschedule it. The Respondent did not respond to Kendall's application thereafter.

We agree with the judge's finding that Dinwiddie refused to rehire Kendall because of his union activity, in violation of Section 8(a)(3) and (1).[11] The Respondent claims that it deemed Kendall ineligible to be rehired because he failed to give 2 weeks' notice prior to resigning his full-time position. The judge, however, specifically discredited the Respondent's claim that it had such a policy and that Dinwiddie informed Kendall on April 5 that he would be ineligible for rehire because he was not giving 2 weeks' notice. The judge instead found, and we agree, that the Respondent's assertion of this alleged policy was a pretext for discrimination.[12]

As the judge pointed out, the only documentation of such a policy was a "Conduct and Ability" form Dinwiddie created a week *after* Kendall's last day of work. Moreover, as the judge explained, the record shows that the Respondent did not apply this alleged policy to employee Michael Obenhausen, who quit without giving 2 weeks' notice. For these reasons, as well as those given by the judge, we find that the Respondent refused to rehire Kendall because of his union activity, not because of his alleged failure to give 2 weeks' notice.

C. The Respondent's Alleged Constructive Discharge of Vicky Belcher

The judge found that the Respondent constructively discharged employee Vicky Belcher in violation of Section 8(a)(3) and (1) by varying her work schedule after May 15, when she returned from maternity leave. The Respondent contests the judge's finding, arguing, among other things, that there was not a constructive discharge because Belcher at all times remained a part-time employee of the Respondent. We agree.

Prior to taking leave, Belcher had worked two 16-hour day shifts per week, with 2 days between the shifts. When Belcher returned to work, the Respondent continued to schedule her for 2 16-hour day shifts per week, but varied the number of days between the shifts. Belcher complained to the Respondent that she needed her prior schedule because of her childcare responsibilities. The Respondent refused to return Belcher to her prior schedule, but offered her a full-time position. Belcher declined the position because the Respondent could not guarantee her a regular schedule. Thereafter, the Respondent and Belcher agreed that Belcher would submit days she could work and that the Respondent would call her as needed. The Respondent actually offered her such shifts on an almost daily basis, including days Belcher said she would be available to work.

[10] Unlike our dissenting colleague, we do not believe Kendall was required to expressly advise Dinwiddie that he, Kendall, would be forced to resign because of the schedule change. In any event, Kendall's informing Dinwiddie of his conflicting childcare responsibilities provides the functional equivalent of such notice.

[11] Although this violation was not specifically alleged in the complaint, we agree with the judge that it was closely related to Kendall's constructive discharge and was fully litigated.

[12] As a result, we find it unnecessary to pass on the Charging Party's contention that Kendall actually informed Dinwiddie of his intent to resign some 2-1/2 weeks prior to April 9.

Belcher, however, never accepted any of the offered shifts.

Based on the record before us, we find insufficient evidence that Belcher resigned her employment with the Respondent. Under the *Crystal Princeton Refining* test, supra, for alleged constructive discharges, "the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign." Although there clearly was a scheduling dispute between the Respondent and Belcher after her maternity leave, there is no evidence that Belcher resigned her employment. To the contrary, as the Respondent points out, Belcher continued to offer to work part-time shifts for the Respondent, and the Respondent offered her such shifts on an almost daily basis.

Belcher never worked any of the shifts offered by the Respondent, but it appears to have been related to her taking another job in the emergency room of a local hospital, and not to her childcare responsibilities. Belcher herself testified that the reason she declined many of the shifts offered by the Respondent was that "I'm already obligated to [the] ER, I cannot just come in at the drop of a hat." Even when the Respondent called Belcher on the specific days she said she would be available, Belcher only "offered to come in and work half a shift because I'm already obligated to the emergency room."

In these circumstances, we find that the General Counsel failed to establish that Belcher resigned her employment with the Respondent. Accordingly, we dismiss the allegation that she was constructively discharged.[13]

III. THE GENERAL COUNSEL'S EXCEPTIONS

The General Counsel's exceptions 1 through 30 cover a variety of alleged violations of Section 8(a)(1), (3), and (5) dismissed by the judge. Exceptions 31 through 44 cover remedial and notice issues. We find it unnecessary to reach many of these exceptions.[14] We find merit in other exceptions.[15]

A. The 8(a)(1) Dismissals

The General Counsel contends in exception 17 that the judge erroneously dismissed an allegation that in early June 1999 Human Resources Manager Debbie McDaniel violated Section 8(a)(1) when she threatened to send employee Amy Brumley home if she did not sign a workers' compensation waiver form. The judge found that this alleged violation was duplicative of his finding (now uncontested) that Director Dinwiddie violated Section 8(a)(3) and (1) by refusing to allow Brumley to work from June 2–9, 1999, because she had not signed the waiver form. We agree with the judge that McDaniel's alleged threat to send Brumley home for failing to sign the waiver form was essentially part of Dinwiddie's unlawful suspension of Brumley for the same reason. Additionally, given the numerous uncontested violations, we find that the alleged violation, even if found, would not materially affect the remedy. We will not disturb the judge's conclusions in this regard.[16]

[13] Member Liebman finds it unnecessary to pass on the alleged constructive discharge because she would find that the Respondent violated the Act by altering Belcher's regular schedule in approximately May 1999 from her usual 1-day-on/2-days-off work pattern, and that this violation warrants make-whole relief. Belcher expressly asked Dinwiddie to restore her regular schedule because the unpredictability made it impossible for her to arrange childcare. Dinwiddie refused, but offered Belcher a full-time position. Belcher declined the offer solely because Dinwiddie insisted that he could not provide her with a regular full-time schedule; he declared that Belcher's schedule would be "whatever he deemed necessary." However, as the judge found, Dinwiddie contemporaneously offered employee James Dukes, who was not a union supporter, a regular full-time schedule to induce him to go from a part-time to a full-time position. Moreover, Dukes's new full-time schedule was substantially identical to his prior part-time schedule. In light of these facts, the judge specifically found that the Respondent discriminated against Belcher by failing to offer Belcher full-time employment on terms comparable to Dukes (a regular schedule similar to her part-time schedule) because of Belcher's support for the Union. Member Liebman would adopt the judge's finding and order make-whole relief from the date of Dinwiddie's offer to Belcher.

[14] We find it unnecessary to address GC exceptions 1 through 16 and exceptions 31 through 44. The General Counsel argues in exceptions 1 through 16 that the judge erroneously dismissed allegations that various managers and supervisors made unlawful solicitations, promises of benefits, threats of discharge, threats of wage reductions and other losses of benefits, and engaged in unlawful surveillance. Even if found, these alleged violations would be cumulative of the Respondent's many uncontested violations covering the same types of misconduct, and would not materially affect the remedy. In exceptions 31 through 44, the General Counsel argues that the judge erroneously omitted appropriate remedial and notice provisions. We find it unnecessary to specifically address these exceptions beyond observing that we have included in the Order and Notice the appropriate provisions, consistent with the violations found in this proceeding.

[15] The General Counsel correctly points out in exceptions 26 and 27 that the judge inadvertently failed to provide make-whole relief to employee Amy Brumley based on her unlawful suspension from June 2–9, and to employees who were unlawfully required to pay $50 for the Transitional Training Course. We shall provide the necessary relief. The General Counsel also points out in exception 28 that the judge, in finding that Director Jacobs unlawfully threatened employees Tyra Kay Phillips and Norman Byers, inadvertently cited complaint par. 6(i) instead of par. 5(i). In exception 30, the General Counsel observes that the judge inadvertently dismissed complaint par. 6(qq), concerning the unlawful discharge of employee Cynthia Payne. We correct these inadvertent errors.

[16] Member Liebman agrees with the General Counsel that Director Dinwiddie's unlawful refusal to allow Brumley to work from June 2–9, 1999, and Human Resources Manager McDaniel's unlawful threat to send Brumley home if she did not sign a workers' compensation waiver form constitute distinct unfair labor practices. Accordingly, Member Liebman would find that McDaniel's threat independently violated Sec. 8(a)(1).

B. The 8(a)(3) and (1) Dismissals

The General Counsel contends in exception 18 that the judge erroneously dismissed an allegation that the Respondent violated Section 8(a)(3) and (1) by discharging employee Nancy Baker because of her support for the Union. The judge's dismissal of this allegation was based on his finding that the Respondent did not discharge Baker. The judge specifically discredited Baker's claim that on March 12, Director Dinwiddie told her, "you don't work here any longer." As the judge explained, his finding of no discharge was further supported by Baker's own testimony that Supervisor Marietta Coakley called her on March 14,[17] and informed Baker that the Respondent was expecting her at work that evening. Given the judge's credibility determination, we find no merit in the General Counsel's exception.

In exception 19, the General Counsel argues that the judge erroneously dismissed an allegation that the Respondent violated Section 8(a)(3) and (1) by requiring a new employment application from union supporters desiring to switch from full-time to part-time status. The judge found that this alleged violation was de minimis, because the General Counsel failed to show how completing a new application adversely affected employees in any material way. We agree. Even assuming that the Respondent's action was unlawfully motivated, a Board remedy for de minimis misconduct is unwarranted. Similarly, the General Counsel's failure to explain how or why the Respondent's application requirement adversely affected employees undermines the General Counsel's contention in exception 25 that this change violated Section 8(a)(5) and (1) as well. As a result, we find no merit in the exception. See *Advertiser's Mfg. Co.*, 280 NLRB 1185, 1193–1194 (1986), enfd. 823 F.2d 1086 (7th Cir. 1987) (finding that, even if employer's discriminatory change in employee's parking space violated Section 8(a)(3), the change did not violate Section 8(a)(5)).[18]

In exception 29, the General Counsel argues that the judge erred in finding it unnecessary to decide whether Director Dinwiddie's denial of part-time status to employee Norman Byers violated Section 8(a)(3) and (1). We agree with the judge. Prior to February 21, Byers worked full time on the day shift. Beginning on February 21, however, the Respondent scheduled Byers to work the night shift, from 11 p.m. to 7 a.m. Byers asked to return to the day shift in mid-March, but the Respondent refused his request. As a consequence of that refusal, Byers asked to work part time. We have adopted the judge's finding that the Respondent constructively discharged Byers in violation of Section 8(a)(3) and (1) by refusing his request to return to the day shift.[19] As a result, as the judge did, we find it unnecessary to decide whether the Respondent's denial of part-time status to Byers was unlawful. It is clear that Byers only requested part-time status because the Respondent prevented him from returning to his full-time position on the day shift. The remedy we provide today requires the Respondent to offer Byers reinstatement to that position, thereby rendering the part-time issue moot.

C. The 8(a)(5) and (1) Dismissals

The Respondent does not except to the judge's finding that it violated Section 8(a)(3) and (1) by failing to conduct promised annual evaluations (and to grant appropriate wage increases based on them), by implementing a new requirement that all employees sign a clothing-reimbursement form, and by instituting a new $50 fee for an EMT training course. The complaint alleges in each instance that the Respondent's actions—undertaken without notice to or bargaining with the Union—violated Section 8(a)(5) and (1) as well. The judge found it unnecessary to decide the 8(a)(5) allegations and, in exceptions 20, 21, and 22, the General Counsel argues that this was error. We agree with the judge because finding the additional violations would not materially affect the remedy.[20]

Finally, the General Counsel contends in exceptions 23 and 24 that the judge erroneously failed to find 8(a)(5) violations based on the Respondent's changes in employees' shifts, its assignment of employees Phillips and

[17] The judge inadvertently stated that this telephone call occurred on May 14.

[18] Because the judge found no reliable evidence to support the Respondent's claim of a preexisting policy applicable to all employees, Member Liebman would find that the Respondent's sudden imposition of the new-application requirement on union supporters, including employees Cynthia Payne and Brian Kendall, was unlawful. As to the necessity of a Board remedy, it is settled that whether an employer's discriminatory conduct warrants Board action should be determined in light of the employer's conduct overall. See *Xidex Corp*., 297 NLRB 110, 111 (1989), enfd. 924 F.2d 245 (D.C. Cir. 1991); *Advertiser's Mfg. Co.*, 280 NLRB at 1193.. Applying that standard, it is clear that the Respondent's action was part of a pattern of harassment of union supporters and, in that context, rises to the level of an 8(a)(3) and (1) violation requiring a Board remedy. For similar reasons, Member Liebman would find merit in the General Counsel's contention in exception 25 that the Respondent's unilateral imposition of this requirement also violated Sec. 8(a)(5) and (1).

[19] The Respondent has not excepted to this finding.

[20] Member Liebman would find that the Respondent's unilateral action in each instance violated Sec. 8(a)(5) and (1). See, e.g., *Joy Recovery Technology Corp.*, 320 NLRB 356 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998) (finding that employer's unilateral closing of transportation department and outsourcing of unit work violated both Sec. 8(a)(3) and (5)); *Thill, Inc.*, 298 NLRB 669 (1990), enfd. in part 980 F.2d 1137 (7th Cir. 1992) (finding that employer's unilateral refusal to restore earlier pay cut to employees violated both Sec. 8(a)(3) and (5)).

Amy Brumley to nine consecutive night shifts, and its assignment of employee Dennis Wade to wax an ambulance. We find no merit in these exceptions. With respect to the shift changes and assignments, the judge specifically found "no evidence that anything such as a permanent shift or partner assignment existed at any time." As a result, the shift changes and assignments complained of did not constitute a change in any existing term or condition of employment. Similarly, the record shows that prior to the February 24 representation election the Respondent had occasionally assigned employees to wax ambulances. For these reasons, we agree with the judge that the Respondent's actions did not violate Section 8(a)(5) and (1).

IV. THE CHARGING PARTY'S EXCEPTION

The Charging Party has excepted to the judge's failure to recommend in his remedy that the Board require LTC President Mackin or Director Dinwiddie to read aloud the attached notice to employees assembled for that purpose.[21] Section 10(c) authorizes the Board to remedy unfair labor practices by ordering "such affirmative action . . . as will effectuate the policies of [the] Act." It is settled that this power to prescribe effective remedies is "a broad discretionary one, subject to limited judicial review." *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964); *Domsey Trading Corp.*, 310 NLRB 777, 779 (1993), enfd. 16 F.3d 517 (2d Cir. 1994). In the particular circumstances of this case, we find that the Charging Party's requested relief is unnecessary to remedy the violations.[22]

ORDER

The National Labor Relations Board orders that Yellow Enterprise Systems, Inc. d/b/a Yellow Ambulance Service, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or threatening to discharge employees because they support the Professional EMTs & Paramedics or any other union.

(b) Disciplining, warning, or threatening employees with discipline or other reprisals because they support the Professional EMTs & Paramedics, or any other union.

(c) Threatening or suggesting to employees that selecting Professional EMTs & Paramedics, or any other union as their bargaining representative is futile.

(d) Directing employees to remove Professional EMTs & Paramedics or any other union stickers from their personal vehicles.

(e) Directing employees not to discuss union related matters during working hours while permitting the discussion of other matters.

(f) Coercively interrogating employees about their support for or membership in Professional EMTs & Paramedics, or any other union.

(g) Soliciting grievances from employees and impliedly promising to remedy them if employees abandon their support for the Professional EMTs & Paramedics, or any other union.

(h) Telling employees that other employees had been discharged because they supported the Professional EMTs & Paramedics, or any other union.

(i) Engaging in surveillance of employees' union activities or creating the impression of surveillance of their union activities.

(j) Reassigning employees or changing employees schedules because they support the Professional EMTs & Paramedics, or any other union.

(k) Taking unilateral action on employees' dress codes, or other mandatory subjects of bargaining, without giving the Professional EMTs & Paramedics prior notice and an opportunity to bargain with respect to these subjects.

(l) Charging employees to attend the Transitional Training Course because they support the Professional EMTs & Paramedics, or any other union.

(m) Failing and refusing to rehire employees because they support the Professional EMTs & Paramedics, or any other union.

(n) Failing and refusing to issue evaluations of employees and, where appropriate, issue wage increases to employees because they support the Professional EMTs & Paramedics, or any other union.

(o) Requiring employees to sign a clothing reimbursement form because they support the Professional EMTs & Paramedics, or any other union.

(p) Imposing more onerous work assignments on employees because they support the Professional EMTs & Paramedics, or any other union.

(q) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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[21] The Charging Party acknowledges that it did not seek this remedy before the judge. The Charging Party correctly argues, however, that "the Board's power to remedy unfair labor practices is not limited by the parties' failure to request or oppose any specific remedy." *Nabco Corp.*, 266 NLRB 687 fn. 1 (1983).

[22] Member Liebman would grant the Charging Party's request that the Board require Director David Dinwiddie to read aloud the attached Notice to employees assembled for that purpose. Dinwiddie was personally involved in, and primarily responsible for, many of the Respondent's unfair labor practices. In these circumstances, she finds that Dinwiddie's reading of the notice, or at least his presence while it is read, is appropriate and necessary to dispel the atmosphere of intimidation he personally created. See *Three Sisters Sportswear Co.*, 312 NLRB 853 (1993), enfd. 55 F.3d 684 (D.C. Cir. 1995), cert. denied 516 U.S. 1093 (1996).

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer the following employees full reinstatement to their former jobs or, if a job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

> Chris Embry, Renee McKinney, Richard Turner, Norman Byers, James Hardin, Brian Kendall, Cynthia Payne, and Roger Brumley

(b) Make the following employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision: Chris Embry, Renee McKinney, Richard Turner, Norman Byers, James Hardin, Brian Kendall, Cynthia Payne, Roger Brumley, Kimberly Childers, and Amy Brumley.

(c) Make whole all employees who paid $50 to attend the Transitional Training Course, with interest.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful disciplinary actions taken against the following employees and, within 3 days thereafter, inform them in writing that this has been done, and that the disciplinary actions will not be used against them in any way:

> Chris Embry, Renee McKinney, Richard Turner, Norman Byers, James Hardin, Brian Kendall, Cynthia Payne, Roger Brumley, Kimberly Childers, Amy Brumley, Jeffrey James, Tyra Kay Phillips, and Darrell Lancaster;

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records it stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its office on Alsop Lane in Owensboro, Kentucky, copies of the attached notice marked "Appendix B."[23] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 17, 1998.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(h) IT IS FURTHER ordered that the complaint is dismissed to the extent it alleges violations of the Act not found.

MEMBER SCHAUMBER, dissenting in part.

Unlike my colleagues, I find that the Respondent did not violate Section 8(a)(3) and (1) by constructively discharging Brian Kendall. As my colleagues note, the Board stated in *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976), that two elements must be proven to establish a constructive discharge:

> First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities.

Even assuming arguendo that Kendall's schedule was changed because of his union activities, the General Counsel has failed to satisfy the first *Crystal Princeton* criterion.

Far from creating an extraordinarily difficult or unpleasant change in Kendall's working conditions, the schedule adjustment resulted in his performing the same work, on the same days of the week, for the same number of hours per week, with the same benefits. Thus, both before and after the schedule change, Kendall worked as an emergency medical technician (EMT) 3 days a week on a full-time schedule with full-time employee benefits. Both before and after the schedule change, Kendall worked 16 hours on Monday, 8 hours on Wednesday, and 16 hours on Friday.

It is true that, after the schedule adjustment, Kendall's Wednesday shift, which had been a day shift, became a

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

night shift. This fact, however, is insufficient to establish a violation.

My colleagues' finding of a violation here rests, at bottom, on their conclusion that Supervisor Dinwiddie knew or should have known that the schedule change would render Kendall unable to continue working as a full-time employee. In my view, however, the General Counsel has not met his burden as to this issue. Thus, there is no evidence that Kendall told Dinwiddie that he would have to quit because of the change. As to whether Dinwiddie reasonably should have known that the change would render Kendall's quitting inevitable, Dinwiddie's willingness to allow Kendall to trade shifts with other employees (and, indeed, Kendall's initial success in doing so) points in the opposite direction. Dinwiddie apparently cared only that someone cover the Wednesday night shift, not that Kendall do so. Nor do I share my colleagues' unsupported assumption that the night shift was undesirable and that Dinwiddie therefore knew that Kendall would be unable to continue trading shifts. It would be equally reasonable to suppose that for some employees a night shift might be desirable, depending on specific circumstances unique to each individual employee.

Kendall continued to trade his night-shift schedule until he voluntarily left the Respondent's employ, without giving notice, to take another job. Indeed, he later made considerable efforts to return to the Respondent's employ, further suggesting that he had not found his previous experience as an employee of the Respondent unusually difficult or unpleasant. For all of these reasons, I would dismiss this allegation.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or threaten to discharge employees because they support the Professional EMTs & Paramedics, or any other union.

WE WILL NOT discipline, warn, or threaten employees with discipline or other reprisals because they support the Professional EMTs & Paramedics, or any other union.

WE WILL NOT threaten or suggest to employees that selecting Professional EMTs & Paramedics, or any other union as their bargaining representative is futile.

WE WILL NOT direct employees to remove Professional EMTs & Paramedics or any other union stickers from their personal vehicles.

WE WILL NOT direct employees not to discuss union related matters during working hours while permitting the discussion of other matters.

WE WILL NOT coercively interrogate employees about their support for or membership in Professional EMTs & Paramedics, or any other union.

WE WILL NOT solicit grievances from employees and impliedly promise to remedy them if employees abandon their support for the Professional EMTs & Paramedics, or any other union.

WE WILL NOT tell employees that other employees had been discharged because they supported the Professional EMTs & Paramedics or any other union.

WE WILL NOT engage in surveillance of employees' union activities or create the impression of surveillance of their union activities.

WE WILL NOT reassign employees or change employees' schedules because they support the Professional EMTs & Paramedics, or any other union.

WE WILL NOT take unilateral action on employees' dress codes, or other mandatory subjects of bargaining, without giving the Professional EMTs & Paramedics prior notice and an opportunity to bargain with respect to these subjects.

WE WILL NOT charge employees to attend the Transitional Training Course because they support the Professional EMTs & Paramedics, or any other union.

WE WILL NOT fail and refuse to rehire employees because they support the Professional EMTs & Paramedics, or any other union.

WE WILL NOT fail and refuse to issue evaluations of employees and, where appropriate, issue wage increases to employees because they support the Professional EMTs & Paramedics, or any other union.

WE WILL NOT require employees to sign a clothing reimbursement form because they support the Professional EMTs & Paramedics, or any other union.

WE WILL NOT impose more onerous work assignments on employees because they support the Professional EMTs & Paramedics, or any other union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of this Order, offer the following employees full reinstatement to their former jobs or, if a job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed: Chris Embry, Renee McKinney, Richard Turner, Norman Byers, James Hardin, Brian Kendall, Cynthia Payne, and Roger Brumley.

WE WILL make the following employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest:

> Chris Embry, Renee McKinney, Richard Turner, Norman Byers, James Hardin, Brian Kendall, Cynthia Payne, Roger Brumley, Kimberly Childers, and Amy Brumley

WE WILL make whole, with interest, all employees who paid $50 to attend the transitional training course;

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful disciplinary actions taken against the following employees and, within 3 days thereafter, inform them in writing that this has been done, and that the disciplinary actions will not be used against them in any way:

> Chris Embry, Renee McKinney, Richard Turner, Norman Byers, James Hardin, Brian Kendall, Cynthia Payne, Roger Brumley, Kimberly Childers, Amy Brumley, Jeffrey James, Tyra Kay Phillips, and Darrell Lancaster.

YELLOW ENTERPRISE SYSTEMS, INC. D/B/A YELLOW AMBULANCE SERVICE

Walter Steele and *Belinda Brown, Esqs*., for the General Counsel.

James U. Smith, III and *Bryan M. Cassis, Esqs. (Smith & Smith),* of Louisville, Kentucky, for the Respondent.

Anita O'Neil, Esq. (Blake & Uhlig, P.A.), of Kansas City, Kansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Owensboro, Kentucky, on October 4–8, 12–14, and November 1–3, 1999. The original charges were filed between March 26 and June 4, 1999. The last amended charge was filed on August 30, 1999. On September 14, 1999, the General Counsel issued his amended consolidated complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, with headquarters in Louisville, Kentucky, operates the ambulance service for Owensboro and Daviess County, Kentucky, from its facility on Alsop Lane in Owensboro. It annually purchases and receives goods and materials valued in excess of $50,000 directly from points located outside the Commonwealth of Kentucky. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Chronological overview

Yellow Enterprise Systems is one of two divisions of Louisville Transportation Company. The other division is the Yellow Cab Company. Jeff Mackin is the president of Louisville Transportation and Paul Powell Jr., is the executive vice-president. Sherman Hockenberry is the executive director and vice president of Yellow Enterprise Systems for Health Services. In that capacity he reports directly to Powell and is responsible for the operations of a number of subsidiaries in Indiana and Kentucky, including Yellow Ambulance of Daviess County, Kentucky.

Prior to August 1997, two ambulance services operated in Daviess County, pursuant to certificates of need issued by the Commonwealth. In August 1997, Yellow Enterprises purchased one of these services, Arrow Ambulance Company and its certificate of need from its owner, Russ Walkosak. Walkosak thereupon became the director of Yellow Ambulance of Daviess County and most or all of his employees became employees of Respondent.

In February 1998, Yellow was awarded a contract to operate the other ambulance service in Daviess County, pursuant to the certificate of need owned by the city of Owensboro and Daviess County. Previously, this ambulance service was administered directly by the Owensboro Hospital. The paramedics and emergency medical technicians (EMTs), who were formerly employed by the hospital, thereupon became Yellow employees as well. Upon the acquisition of the Owensboro Hospital ambulance service, Anthony Gardner became the director of Yellow Ambulance of Daviess County and Walkosak became assistant director.

Gardner stayed in Owensboro for a very short time due to a family emergency and was replaced as director in March 1998 by Daniel Jacobs, who previously had been a shift supervisor in Respondent's Clark County, Indiana operation. In December 1998, Jacobs was relieved of this position. Sherman Hockenberry acted as director in Owensboro for a period of weeks until January 6, 1999, when David Dinwiddie was hired from an unassociated ambulance service to be director.

Union Organizing Activity

Although the origins of the initial union activity are not clear, some Yellow employees, including paramedics Kay Phillips and Terry Dossett received literature in the mail from the

Union in April 1998. Phillips signed an authorization card and shortly thereafter approached Bruce Nanney, to encourage him to join the Union. Dossett had been a supervisor for ambulance crews at Owensboro Hospital. In June or July 1998, he became a street supervisor for Yellow. Nanney is Respondent's senior street supervisor. He has been a supervisor since November 1998.

In June 1998, Yellow moved into a newly renovated facility on Alsop Lane in Owensboro. Among the improvements to its operation was a computer assisted dispatch system. Renovations, which included the paving and striping of an employee parking lot in the rear of the building, were completed by November 25, 1998.

Efforts to organize Yellow, which had apparently been dormant for several months, were renewed in September 1998 by Kay Phillips and her partner, EMT Norman Byers. Phillips and Byers sent letters and authorization cards to approximately 30 employees. Employees also received union material directly from Byers, James Hardin, and possibly others.

The Union held its first meeting in early November 1998 at the IBEW hall in Owensboro. Union stickers, pens, and coffee mugs were distributed. A number of employees placed the union stickers on the rear windshields of the vehicles that they parked in Respondent's employee parking lot. This lot was and is inspected and policed almost daily by Respondent's supervisors and on a regular basis by Hockenberry, Powell, and Mackin.

Legal Framework for Analyzing the Record Evidence

The General Counsel alleges that numerous statements made by Respondent's supervisors to employees violated Section 8(a)(1). Section 8(c) of the Act specifically recognizes an employer's right to express its views about labor issues and unionization in noncoercive terms. Thus, the applicability of Section 8(a)(1) to these statements turns on whether they would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, *Aluminum Casting & Engineering Co.*, 328 NLRB 8, 9 (1999).

The instant record contains a great deal of uncontradicted testimony by employees as to numerous coercive statements made to them by Respondent's supervisors. Except where there is some material inconsistency in the employees' testimony or some other objective reason to doubt this testimony, it has been credited. Thus, as set forth below, the General Counsel has established numerous 8(a)(1) violations. Some of these statements were made by supervisors, who may have had a friendly relationship with the employee and/or desired to warn the employee as to potential danger arising from his or her union activity. Such statements violate Section 8(a)(1) regardless of any "friendly" objective on the part of the supervisor, *Jordan Marsh Stores Corp.*, 317 NLRB 460, 462 (1995); *Trover Clinic*, 280 NLRB 6 fn. 1 (1986), *Hanes Hosiery, Inc.*, 219 NLRB 338 (1975).

In order to prove a violation of Section 8(a)(3) and (1), the General Counsel must show that union activity has been a substantial factor in the employer's adverse personnel decision. To establish discriminatory motivation, the General Counsel must show union or protected concerted activity, employer knowledge of that activity, animus or hostility towards that activity and an adverse personnel action caused by such animus or hostility. Inferences of knowledge, animus and discriminatory motivation may be drawn from circumstantial evidence as well from direct evidence.[1] Once the General Counsel had made a prima facie case of discrimination, the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981).

With regard to the 8(a)(1) and (3) violations alleged in this case, knowledge of the discriminatees' union activity and animus towards that activity is established by direct and circumstantial evidence, including the coercive statements referred to above and the obviously pretextual reasons given for some of the personnel actions taken by Respondent.

> Discriminatory motivation may reasonably be inferred from a variety of factors, such as the company's expressed hostility towards unionization combined with knowledge of the employees' union activities; inconsistencies between the proffered reason for discharge and other actions of the employer; disparate treatment of certain employees with similar work records or offenses; a company's deviation from past practices in implementing the discharge; and proximity in time between the employees' union activities and their discharge.

W.F. Bolin Co. v. NLRB, 70 F. 3d at 871.

As noted by the Court of Appeals for the Ninth Circuit in *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966):

> Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to lawful motive could be brought to book. Nor is the trier of fact-here a trial examiner-required to be any more naïf than is a judge. If he finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal-an unlawful motive-at least where, as in this case, the surrounding facts tend to reinforce that inference.

Accord: *Fast Food Merchandisers*, 291 NLRB 897, 898 (1988); *Fluor Daniel, Inc.*, 304 NLRB 970, 971 (1991).

Each of the alleged violations must be established independently and Respondent's defense to each alleged violation must also be analyzed independently. However, in analyzing each allegation, the entire context of the situation must be considered. This includes other unfair labor practices which have been established, which are highly relevant in determining Respondent's motive—particularly, as in this case, where they establish extreme hostility to unionization and employees' ef-

[1] *Flowers Baking Co.*, 240 NLRB 870, 871 (1979); *Washington Nursing Home, Inc.*, 321 NLRB 366, 375 (1966); *W. F. Bolin Co. v. NLRB*, 70 F.3d 863 (6th Cir. 1995).

forts to organize, *NLRB v. DBM, Inc.*, 987 F.2d 540 (8th Cir. 1993); *Reeves Distribution Service*, 223 NLRB 995, 998 (1976).

The alleged 8(a)(3) and (1) violations in this case range from obvious and blatant, mostly notably in the case of James Hardin's discharge, to some that are very close calls, such as the cases of Renee McKinney and Nancy Baker. Respondent's numerous unfair labor practices committed in ridding itself of union supporters, tips the balance for the General Counsel in establishing violations in some of these cases, but not others.

Alleged Violations of the Act

Russ Walkosak's Interrogation of Kay Phillips and Norman Byers

On or about November 17, 1998, Russ Walkosak walked into the vehicle bay at Respondent's facility and asked if anybody had heard anything about anybody starting a Union. Kay Phillips replied that she had. Later that evening Phillips and Norman Byers were parked in their ambulance at a designated post in Owensboro. Walkosak drove out to their location and got into the ambulance with them. He told Phillips and Byers that he had received a call that morning from someone in Louisville informing him that Phillips and Byers were trying to start a union and directing Walkosak to look into this. Walkosak proceeded to tell the employees that he didn't know if this information was accurate but "the Mackins own 5 steel mills and none of them are union; that should tell you something."

Walkosak asked them some questions about the union mailing and also indicated that the company management would be watching Phillips and Byers.[2] He observed something to the effect that employees who start a union organizing campaign are usually fired before any employees benefit from their efforts.[3] Walkosak's statements constitute violations of Section 8(a)(1) as alleged in paragraph 5(d) and (e) of the complaint. He interrogated Phillips and Byers concerning their union membership, activities, and sympathies; created the impression that their union activities were under surveillance by Respondent, indicated that selecting the Union would be futile and subtly threatened them with discharge if they continued these activities.

Respondent Separates Phillips and Byers

Respondent scheduled its ambulance drivers for 3-week periods. When the first schedule after November 17, was issued, Phillips and Byers were no longer partners. Byers went to see Daniel Jacobs, then the director of the Owensboro facility. Jacobs by this time had received a mailing from the Union and had called one of its organizers in Colorado to speak to him about it. Jacobs told Byers that Sherman Hockenberry had instructed him to separate Phillips and Byers. He also told Byers that Phillips was a troublemaker and that Jacobs did not want Phillips to take Byers "down with her."[4] I conclude that the separation of Byers and Phillips was effectuated to discourage and restrain their union activities and therefore violated Section 8(a)(3) and (1) as alleged in complaint paragraph 6(a). Further, I conclude that Jacobs' statement was a threat that violated Section 8(a)(1) as alleged in complaint paragraph 6(i). There is no indication as to how Phillips was a "troublemaker" other than by virtue of her efforts to organize Respondent's employees. See, e.g., *Dey Rey Torilleria, Inc.*, 272 NLRB 1106, 1115 fn. 21 (1984), which notes that "troublemaker" is often synonymous with union supporter.

Norman Byers' December 11, 1998 Oral Warning

On December 11, Byers, received a disciplinary form documenting an oral warning for clocking in at 9:06 a.m. on December 9, when his shift began at 9 a.m. The dispatcher gave Byers a note stating that he arrived at work at 8:40 a.m. on December 9. Respondent's standard operating procedure states that employees must clock in no more than 5 minutes before their shift and clock out no sooner than the end of their shift.

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[2] Walkosak made a similar inquiry at about this time of employee Chris Embry regarding the union mailing. This inquiry is alleged as an 8(a)(1) violation in complaint par. 5(a). I dismiss that portion of the complaint because I conclude that the interrogation of Embry by Walkosak was not coercive. Walkosak's questions were brief, did not attempt to determine whether Embry was supporting the organizing drive and, contrary to his conversations with other employees, suggested no adverse consequences from supporting the Union. Further, Walkosak's conversation with Embry predated the numerous unfair labor practices committed by Respondent.

[3] I do not credit all of the testimony given by Phillips and Byers. For example, I do not credit testimony by Phillips, which is inconsistent with the affidavit given to the General Counsel. Similarly, some of Byers' testimony, particularly with regard to the date he ceased working for Respondent, is obviously inaccurate. However, I credit the testimony of Byers and Phillips with regard to this incident because their accounts are fairly consistent, consistent with much of the direct and circumstantial evidence in this case and more importantly, uncontradicted. Russell Walkosak, who at the time of the hearing was still Respondent's assistant director, was called as a witness by the General Counsel but not by Respondent. He denied none of the many damaging statements attributed to him.

Contrary to Respondent's arguments at p. 223 of its brief, I conclude that it is absolutely immaterial whether it was Byers or Walkosak, who first mentioned the possibility that Respondent would be watching Byers and Phillips. Any discrepancy between Byers' testimony and Phillips' testimony is also immaterial. In the context of the conversation, Walkosak's confirmation of Byers' fears, as well as his failure to dispel such fears, was coercive.

Walkosak testified that he was "out of the loop" with regard to the supervision of ambulance drivers. This assertion is inconsistent with his testimony that he recommended that ambulance driver Michael Lawson not be disciplined for an accident other than by being sent to driving school and his testimony that he determined that Jamie Hardin was at fault when his ambulance slid off the road in an ice storm in January 1999. Walkosak conducted Hardin's termination meeting on March 19, 1999. Indeed, Walkosak testified that he supervised all Respondent's employees in the absence of the director.

[4] Byers' testimony, regarding this conversation, was not directly contradicted by Jacobs. I do not credit Jacobs' testimony that he separated Byers and Phillips because they were consistently taking more than 20 minutes to get back into service after dropping patients off at the hospital. First of all, concessions made by Jacobs on cross-examination with regard to when he first became aware of the union organizing drive, establish that his direct testimony was less than candid. Secondly, there is no evidence that he told either Byers or Phillips that this was the reason he was separating them. Thirdly, I find particularly unreliable Jacobs' testimony that Byers/Phillips performance was worse than other crews.

The General Counsel alleges in paragraph 6(c) of the complaint that Respondent violated Section 8(a)(3) and (1) in issuing this warning to Byers. I find that the General Counsel has established a prima facie case, which has not adequately been rebutted by Respondent. By December 11, Respondent knew of Byers' role in the organizing drive and had already exhibited extreme animus towards his activities. Among the considerations that lead me to conclude that the warning was discriminatory is that there is no evidence that Byers violated any company policy.

The note that Byers obtained from the dispatcher indicates that he was not tardy. Furthermore, Respondent's standard operating procedure (GC Exh. 3 at p. 15), does not require that an employee clock in no later than 5 minutes after the shift starts. As Danny Jacobs explained the rule at Transcript 1896:

> Primarily the reason [for the rule] was for the time clock because anything greater than five to seven minutes would actually roll back to the previous quarter hour. So it was more from I guess to ease my job with regard to payroll.

The objective of the rule, therefore, appears to be to prevent payment of unnecessary overtime. The absence of evidence that Byers violated a company rule leads me to conclude that the reasons for the warning are pretextual. The pretextual nature of the warning, numerous demonstrations of Respondent's animus towards union activity and the pattern of discriminatory conduct by Respondent lead me to conclude that Byers warning was discriminatorily motivated.

Russ Walkosak's Warning to Brian Kendall

After union stickers began to appear on the windshields of a number of the employee vehicles in Respondent's parking lot, a number of supervisory officials informed employees as to management's reaction to the stickers. Russ Walkosak told EMT Brian Kendall that Jeff Mackin had told Walkosak that he wanted every employee with a union sticker on their truck fired. Walkosak advised Kendall to remove the sticker from his truck (Tr. 594).[5]

Lisa Byers' Warning to Amy Brumley; Walkosak's Warning to Amy and Roger Brumley

In late December, Lisa Byers, Respondent's dispatch supervisor, told EMT Amy Brumley that Danny Jacobs, Sherman Hockenberry, Russ Walkosak, and Paul Powell had been in the employee parking lot and wrote down the names of every employee with a union sticker on their vehicle. Shortly thereafter, Walkosak also told Amy Brumley and her husband, paramedic Roger Brumley, that the Company took the union stickers as "a slap in the face" and that it would be in the Brumley's best interests to remove the union stickers from their vehicles.[6]

Written Warnings Issued to Roger and Amy Brumley

Paragraph 6(f) of the complaint alleges that, "[o]n an unknown date in January, 1999, Respondent issued written warnings to its employees Amy Brumley and Roger Brumley." The record establishes that the warnings in question were issued on December 11, 1998, for failure to get the signatures of both the patient and medical facility on a blue Medicare form. I dismiss this allegation because the General Counsel failed to establish that Respondent was aware of the Brumleys' union sympathies at the time these warnings were issued.

Brenda Thompson's Surveillance of Union Supporters

During the fall and winter of 1998 and 1999, a number of Respondent's supervisors went to a designated post adjacent to the IBEW hall while union meetings were in progress. In January 1999, Brenda Thompson, a supervisor, told her partner, Vicky Belcher, that they were to make sure that no employee, who was on duty, attended the union meeting. In sending Thompson to this location for this purpose, Respondent violated Section 8(a)(1), as alleged in complaint paragraph 5(dd)(ii).[7]

The Discharge of Chris Embry

On December 15, 1998, Respondent fired EMT Chris Embry. Yellow contends that Embry was fired because on October 30, 1998, he ran low on gas due his negligence and incurred a $54 towing charge which he concealed from Respondent. The General Counsel contends that this explanation is pretextual and that Embry was fired to restrain, coerce, and interfere with the Section 7 rights of employees.

On Friday, October 30, Embry and Nancy Baker were sent from Owensboro to Covington, Kentucky, 200 miles away, to pick up a patient in an ambulance. On the way back, Embry ran low on diesel fuel in New Albany, Indiana, which is across the Ohio River from Louisville, half the distance between Covington and Owensboro.[8] He called the Yellow dispatcher in Owensboro and asked her to call Yellow's office in Louisville and ask it to bring him diesel fuel or take him some place where he could get it.

In about a half-hour a tow truck appeared and Embry followed it to a station where he refueled. He then returned to Owensboro. On Monday morning, November 2, 1998, Embry discussed the incident with Assistant Director Russ Walkosak.

[5] I credit Kendall's testimony in this regard not only because it is uncontradicted by Walkosak, but also because it is consistent with other direct and circumstantial evidence in this case. With regard to direct evidence, Supervisor Brenda Thompson denied telling employee Richard Turner that Sherman Hockenberry had been told by Jeff Mackin that employees with union stickers should be fired. However, Thompson testified that "there were several talking around in the garage, people, employees were talking about that, had made comments about it." (Tr. 1999.) At a minimum, this indicates that the contention that they heard that Mackin had made such statements was not something fabricated by the General Counsel's witnesses to buttress their case in this hearing. Although Thompson could merely be relating a rumor that was making the rounds of Respondent's facility in January 1999, her testimony strikes me as making it more likely that Kendall's testimony regarding his conversation with Walkosak is true. Other testimony, although ambiguous, indicates that she may have heard other supervisors make such remarks.

[6] Lisa Byers, who at the time of the hearing was still Respondent's dispatch supervisor, was not called as a witness by either party. Thus, Amy Brumley's account of her conversation with Byers is uncontroverted. Lisa Byers is the wife of alleged discriminatee Norman Byers. The couple was separated from January to about August 1999.

[7] Thompson did not directly contradict Belcher's testimony in this regard.

[8] Embry may have been able to refuel in Louisville, but did not do so.

Walkosak laughed about what occurred and did not mention to Embry that he might be disciplined for what happened.[9]

In early December, Embry displayed a union sticker on the rear windshield on his truck.[10] On December 15, 1998, Danny Jacobs called Embry into his office and told him that he had just received a $54 bill from the towing company and that he was firing Embry because he had informed neither Jacobs nor Walkosak about the October 30 incident. Embry replied that he had reported the incident to Walkosak; Walkosak confirmed that this was true. Jacobs reiterated that neither he nor Walkosak had been informed of the incident in a timely manner and that he (Jacobs) had been made to "look like a dumb ass" in front of Sherman Hockenberry. Jacobs proceeded to terminate Embry.

A few days later, Embry returned to the Yellow facility to pick up a paycheck. He went to Sherman Hockenberry and asked if he could have his job back if he reimbursed Yellow for the $54 towing charge. Hockenberry said he would have to talk to Jacobs. Neither Hockenberry nor Jacobs responded to Embry's offer.

Embry returned to the facility again two weeks later to pick up another check. At this time Russ Walkosak told Embry that he thought Embry had been fired because he was prounion. He also told Embry that Jacobs, Paul Powell, and Jeff Mackin had walked around the parking lot and wrote down the names of employees with union stickers and that Embry's name was one of those recorded. Finally, Walkosak asked Embry who started the Union. Embry said he wouldn't tell him. Walkosak said that was fine because he already had an idea that Kay Phillips and Norman Byers had initiated the organizing campaign.

I conclude that Embry's discharge violated Section 8(a)(3) and (1) as alleged. Respondent's knowledge and hostility towards Embry's union activity is established by both direct and circumstantial evidence. Discriminatory motivation is established by compelling circumstantial evidence. Most noteworthy is the fact that Respondent knew Embry ran out of gas and dispatched the tow truck 7 weeks before his discharge. Yet, it never disciplined him until after it saw the union sticker on his truck, *Montgomery Ward & Co.,* 316 NLRB 1248, 1253 (1995). Moreover, Respondent's failure to offer any explanation as to why it did not take Embry up on his offer to reimburse it for the $54, in lieu of discharging him, is additional evidence of discriminatory motive.

As a matter of law, I conclude that Respondent has not met its affirmative defense that it would not have fired Embry had he not displayed his support for the Union. As a factual matter I conclude that Daniel Jacobs used the bill for the tow truck as an excuse to carry out the wishes of his superiors to take advantage of every available opportunity to get rid of union supporters.

[9] Embry's account of this conversation and the others recounted below was not contradicted.

[10] Danny Jacobs' testimony at Tr. 1913, that he did not know who was engaged in union activity at this time is not credible. Jacobs, on cross-examination, conceded that his testimony that he was not aware of the organizing drive prior to November 25, was inaccurate. I conclude that he was well aware of which employees, including Embry, were displaying union stickers on their vehicles by December 15.

James Hardin's Written Warning of December 22, 1998

On December 22, James Hardin and his partner, Carvella Coomes, returned later than scheduled to Respondent's headquarters from a basic life support (BLS) run.[11] They refueled the ambulance but left linen and a few pairs of latex gloves in a trashcan inside the vehicle. Bruce Nanney, the senior street supervisor, gave Hardin a disciplinary form documenting an oral warning the next day.[12] When Hardin complained about having the warning documented, Nanney replied that all disciplinary actions had to be documented now.

A few days later, Hardin complained to Sherman Hockenberry about the written nature of the warning. Hockenberry told him that supervisors had been instructed to document everything. He conceded that prior to the union campaign that Nanney would have probably just given Hardin a verbal reminder to empty the trash and linen from the vehicle in the future and that except for the union organizing campaign, Hardin would not have received any written form of discipline. Hockenberry observed that "employees had created this situation." Finally, he stated that "if all this passes" warnings such as that given to Hardin might be transferred out of their personnel file and into a separate file (Tr. 1173–1181; GC Exh. 33 (a tape recording made by Hardin of his conversation with Hockenberry)).

A change in policy that results in the issuance of "written oral warnings" as opposed to oral reprimands as part of a disciplinary procedure is permissible when it is not implemented in response to protected union activities. However, where such a change in policy is made in response to an organizing campaign, it violates Section 8(a)(3) and (1) and so does any "written oral warning" issued pursuant to that policy, *Contris Packing Co.,* 268 NLRB 193 at 197 and 215 (1983); *Mississippi Tank Co.,* 194 NLRB 923, 925 (1972). Thus, Respondent violated the Act in issuing such a warning to James Hardin on December 22, 1998.

The Written Warning Issued to Jeffrey James on January 4, 1999

Like many of Yellow Ambulance's employees, paramedic Jeffrey James worked part time for an ambulance service in a neighboring county. Early in the morning of January 4, 1999, James, who openly supported the Union, called the Yellow dispatcher to let the dispatcher know that he might be later than the 7:30 a.m. scheduled start of his shift. James arrived and clocked in at 7:31 a.m..[13]

[11] Basic Life Support (BLS) runs are distinguished from Advanced Life Support (ALS) runs by their nonemergency nature. Often BLS runs consist merely of taking elderly patients to and from a nursing home to a doctor's appointment. BLS ambulance units are often staffed by two EMTs, who unlike paramedics, are not qualified to start intravenous treatments or other emergency measures. A BLS unit usually will not have waste that is contaminated by blood or other body fluids.

[12] While Hardin openly supported the Union, Coomes did not, except for a 1-month period in about April 1999.

[13] That James clocked in 1 minute after his shift started is established by the tardy memo sent to Hockenberry by Russ Walkosak, as well as James' testimony, GC Exh. 18; Tr. 666.

After he had left Respondent's headquarters in his ambulance, James was instructed to return. When he arrived, he was given a written warning by Sherman Hockenberry, then acting as Yellow's director in Owensboro. James argued that he did not deserve any discipline but assuming that he did, it should be an oral warning, not a written warning. Hockenberry said James had been counseled for tardiness previously by Bruce Nanney. James said that was incorrect and asked for the opportunity to speak to Nanney. Russ Walkosak, who was present when the disciplinary form was presented, told James that "with all the stuff going on concerning the union, that we have no choice but to go by the book."

Hockenberry did agree that if Nanney conceded that he had not previously warned James about tardiness, he'd reconsider the written warning. A few weeks later, James talked to Nanney, who admitted that he may not have warned James about being tardy prior to January 4. Nanney said he would speak to Hockenberry, but neither of them approached James about the warning.

James then went to speak to David Dinwiddie, who had become director on January 6. Dinwiddie told James he couldn't do anything about the warning because it might be interpreted as an effort to influence James' vote in the upcoming NLRB election. Dinwiddie told James, however, that he should talk to him about the warning after the election.

After the February 24, 1999 election, James went to see Dinwiddie about the warning. Dinwiddie's response to James' inquiry was, "I have bosses too and my boss says it stays in there" (Tr. 673–674).[14]

Paragraph VIII of respondent's standard operating procedures (SOP) (GC Exh. 3 p. 16) provides:

> Effective November 1, 1988, the policy on absences and tardies shall be:
>
> . . . .
>
> A tardy shall be defined as being more than five minutes late for your shift . . .

Similarly, paragraph IX of the SOP states, "Employees are to report to duty at their regularly scheduled time and are considered tardy five (5) minutes after their scheduled starting time. (GC Exh. 3, p. 18.)

David Dinwiddie was given Respondent's Louisville SOP, General Counsel Exhibit 3, on January 6, 1999, his first day at work. Sherman Hockenberry told Dinwiddie that the Owensboro operation was governed by those SOPs, but that he wanted Dinwiddie to draft an SOP that was specific to Owensboro, i.e., deleted references that were applicable to Louisville area operations, but not to Owensboro. For example, references to the Jewish Hospital in Louisville were to be deleted. However, no substantive changes were made to the SOP (Tr. 139).

On about May 1, 1999, Yellow issued its Owensboro SOP. Paragraph VIII of the Owensboro SOP states:

"*Effective November 1, 1988*, the policy on absences and tardiness shall be [emphasis added]:

> . . . .
>
> A tardy is defined as clocking in after the schedule time your shift starts . . ."

It is thus evident that the written warning issued to James was contrary to the definition of tardiness in Respondent's SOP that was in effect in January 1999.[15] This, being the case, I find that given the overall context in which the warning was given, i.e., Respondent's knowledge of James' support for the Union and its hostility to employees' union activities, that the warning issued to James was discriminatorily motivated and violated Section 8(a)(3) and (1).

Written Warning Issued to Kay Phillips on January 24–29, 1999

Complaint paragraph 6(h) alleges that "[o]n an unknown date in February, 1999, Respondent issued a written warning to its employee Tyra Kay Phillips." The briefs of the General Counsel and the Charging Party discuss a written warning issued to Phillips on January 24, 1999, with regard to this allegation (GC Exh. 11). Respondent's brief does not focus on the January warning, but instead discusses a warning issued on February 19, 1999 (GC Exh. 13).

It is quite apparent from the transcript that the thrust of the General Counsel's case involved the January warning, which I conclude was tried with the consent of the parties, even though it would have been preferable if the pleadings had been amended. The relevance of the February 19 warning to this case is that it constitutes yet another indication of Respondent's animus towards Phillips' union activities. This document establishes that Yellow did not rescind a written warning issued to Phillips for alleged misconduct that it was unable to substantiate; nor did it expunge it from her personnel records (GC Exh. 13).

The January 24, warning arose out of the following incident. On January 21, Phillips was assigned to an ambulance designated by Respondent as "Med 99." As is customary, Phillips inspected the ambulance and noticed that the rear tires on the driver's side were bald. She went to Danny Jacobs, who although no longer the director, was acting in a supervisory ca-

[14] Dinwiddie did not contradict James' testimony that Dinwiddie made such a statement.

[15] Danny Jacobs may have told some employees at a November 25, 1998 meeting that there would be no more grace periods with regard to tardiness. However, employees were not told that the definition of tardy in the SOP had been changed and Hockenberry did not tell Dinwiddie in January 1999, that the definition of tardy in the SOP was no longer applicable. I do not credit Dinwiddie's testimony at Tr. 368, which in response to leading questions, suggests that he was told in January that the tardiness provisions of the Louisville SOP (GC Exh. 3) were no longer operative in Owensboro. There is no indication that Jacobs had authority to so modify such a basic company document or that any such modification was made by any higher authority prior to May 1999.

Moreover, Respondent was aware of the union organizing campaign by November 25, and if a change was made to the definition of tardiness in the SOP only for Owensboro employees, I conclude, in the absence of any alternative explanation, that it was made in response to the campaign and therefore violated Sec. 8(a)(3) and (1), *Contris Packing Co.*, supra.

The May 1999 SOP would also appear to violate the Act if the tardy policy was only changed in Owensboro.

pacity. Jacobs agreed with Phillips that the tires were bald, that they posed a safety hazard and took Med 99 out of service. Phillips used a different ambulance.

Three days later Phillips was again assigned to Med 99. When she inspected the ambulance, she noticed that the bald tires had not been replaced. Jason Tierney, the supervisor on duty, was not at headquarters. The dispatcher, Nancy Baker, told Phillips that Russ Walkosak had put Med 99 back into service. Baker informed Phillips that another ambulance, Med 98, was not being used; Phillips used that vehicle on her shift.

On January 29, David Dinwiddie presented Phillips with a written warning for insubordination, i.e., refusing a direct order to use Med 99. Phillips told Dinwiddie she did not refuse to use Med 99, but rather used Med 98 with the approval of dispatcher Baker. Phillips also asked why she was receiving a written warning when she had no prior discipline. Dinwiddie replied that he was not required to give her an oral warning first.

By this time, Dinwiddie and other Yellow supervisors had been told that Mackin and/or Powell wanted union supporters terminated. Therefore, I conclude that the written warning given to Phillips, the leader of the organizing campaign, was motivated by a desire to retaliate against her for her union activities and to restrain, coerce, and interfere with the exercise of employees' Section 7 rights.

Dinwiddie testified that Nancy Baker told him that Phillips used profanity and refused to drive Med 99. Baker testified at hearing that she told Dinwiddie only that Phillips felt endangered by the bald tires. Moreover, within a few days of January 29, Phillips gave Dinwiddie a statement from Baker supporting her version of the incident (Tr. 1726). Baker thus failed to support Respondent's account long before she herself developed hostility towards Yellow and Dinwiddie.

Moreover, even if Phillips had refused to use Med 99 and used profanity in expressing herself to Baker, Respondent would not have established a nondiscriminatory reason for the warning issued to her. When I asked Dinwiddie why it mattered to him whether Phillips used Med 98 instead of Med 99, he replied:

> There's multiple factors. One is Paul Powell who I answer to in Louisville is a stickler that we average out the mileage's on the trucks. We have to get them within a certain range at the end of each month. That's one factor. The other factor is that we have to assign a truck for the day and a truck for the night to make sure that they go inside. We have to make sure a truck is available every 30 minutes. So if somebody takes a different truck, it could throw the whole schedule out. We schedule the trucks ahead of time, a week ahead. So if someone takes an inappropriate truck, it literally throws the most [sic] schedule out and we have to do the whole schedule [Tr. 1727].

Followed to it logical extreme, Dinwiddie's answer suggests that Respondent would risk the safety of its employees and the patients they transport simply to average out the mileage on its ambulances and stick to its predetermined schedules. Whatever importance Respondent places on its vehicles' mileage and schedules, the fact that it took Med 99 off-line indicates that it does not generally place more weight on these factors than on the safety of its employees and passengers.[16]

Moreover, Respondent has not established that Phillips' taking Med 98 caused any disruption to its operation. Disciplinary action would only be pursued against an employee in this situation if the employer had an ulterior motive. I conclude that Respondent had such a motive, i. e., to lay the groundwork for firing Phillips and intimidating other employees who might support the Union.

Alleged Discriminatory Changes in Shift Assignments and Partners

Complaint paragraphs 6(i), (n), (aa), and (dd) allege that Respondent assigned a number of employees to less desirable shifts and/or to different work partners in a discriminatory fashion to discourage union membership. As Respondent submits, there is no evidence that anything such as a permanent shift or partner assignment existed at any time. However, a number of employees worked the same shift and had the same partner for an extended period of time. For example, Darrell Lancaster and Cindy Payne had worked together on the night shift for almost a year, prior to the February 21, 1999 schedule. Similarly, Dennis Wade had worked with Jeff James for a year on the same shift until the March 14, 1999 schedule. On the basis of this evidence, I conclude that Respondent did not have any policy of routinely or periodically changing shifts or partners and did so only when specific considerations led it to do so.

The timing of the wholesale changes in shifts and partners that occurred with the March 14 schedule suggests discriminatory motive. This was the first schedule following the Union's election victory. Moreover, the schedules of a number of employees, who were not generally regarded to be union supporters, were unchanged. Respondent has offered little in the way of explanation for the specific changes it made on March 14. To the extent that it has offered nondiscriminatory explanations, I do not find them credible.

That Respondent used its work schedules to discourage support for the Union is established by the fact that Richard Turner complained to Bruce Nanney about being scheduled for 9 consecutive nights on the February 21–March 13 schedule. Despite this, David Dinwiddie scheduled union supporters Kay Phillips and Amy Brumley for 9 consecutive nights on the March 14–April 3 schedule.

In the absence of replication, I would have been inclined to find the scheduling of Turner and Norman Byers for nine consecutive nights on the February 21 schedule accidental. However, since Respondent scheduled Phillips and Brumley for nine consecutive nights on the March 14 schedule, after Turner's complaint, I conclude that this scheduling was done with a discriminatory motive. I also infer from this that Dinwiddie's other schedule and partner changes on the March 14–April 3 schedule were made pursuant to a desire to retaliate against

[16] Respondent's evidence that the ambulance was safe to use while the tires were on order is pure hearsay and I conclude completely unreliable. Dinwiddie testified about what Walkosak determined about the tires; no such testimony was elicited from Walkosak.

union supporters and to discourage employees from engaging in union activities.[17]

With regard to the February 21 allegations, I infer that the separation of Lancaster and Payne and their change from night shift to day shift were made in part to retaliate for the protected complaints to Hockenberry on February 10 (see discussion below). I dismiss the allegation with regard to Dennis Wade because his schedule and partner did not change until March 14, and those changes are encompassed by complaint paragraph 6(dd). Finally, while Richard Turner's shift was changed to night in concert with moving Lancaster to the day shift, I conclude from Dinwiddie's unwillingness to change Turner's shift or his nine consecutive night assignment, that this was also done with intent to retaliate against Turner for his support of the Union, and to discourage others from supporting the Union in the election scheduled 3 days later.

Changes in the Roaming Policy (Complaint Pars. 6(m), (v), and 7(i))

Ambulance crews at Yellow are generally assigned a post or specific location at which they are to park and wait for radio messages from the dispatcher to go out on assignment (runs). However, crews are allowed to leave their posts and move to another location, a practice known as "roaming." In November 1998, Daniel Jacobs restricted the area within which crews were allowed to roam. Just prior to the election, Respondent informed crews that they must request permission from the dispatcher in order to "roam" from their designated post. In the absence of evidence that Respondent used this new rule to prevent employees from roaming, I conclude that the change was not motivated by antiunion animus. I therefore dismiss complaint paragraph 6(m), which alleges a violation in this regard on or about February 21.

I dismiss complaint paragraphs 6(v) and 7(i) because Respondent did not announce a new policy on March 2. On that date, David Dinwiddie told Richard Turner that he would have to advise the dispatcher whenever he changed his location. This appears to be the same rule that he implemented just prior to the election.

Cynthia Payne's 2-Day Suspension

Sometime in early February 1999, David Dinwiddie instituted a new policy whereby supervisory personnel were placed in response cars and did not go on ambulance runs. Paramedic Darrell Lancaster took particular exception to the new policy. On February 9, he got into a heated argument over the policy with Supervisor Jason Tierney. At one point Lancaster said to Tierney, "Well mother-fucker, what gives you the right to pick and choose your rides." The next day, Lancaster received a writing warning from Respondent for his disrespectful attitude (R. Exh. 13).

On or about February 10, Lancaster discussed the new policy with his partner, EMT Cynthia Payne, who had also expressed her disagreement with the new policy to Tierney.[18] Payne suggested that she call Sherman Hockenberry in Louisville and ask him to come to Owensboro to discuss the new policy with Payne and Lancaster. Payne then called Hockenberry, who told her he would have to check his schedule. Within a few hours, Dinwiddie called Payne and told her in a very angry voice that if she felt the need to call Hockenberry, she could come into Dinwiddie's office immediately and discuss her problems with him.

At the end of her shift, early on the morning of February 11, Dinwiddie called Payne into his office, yelled at her for going over his head to Hockenberry and handed her a suspension form (GC Exh. 30). That form relates that Payne called Hockenbery to tell him that *she* and *Darrell Lancaster* needed to talk to him about things going on in Owensboro (emphasis added). Payne was suspended for 2 days for insubordination. In the suspension form, Dinwiddie cited a rule in the Yellow handbook requiring employees to call problems to the attention of their immediate supervisor.

The General Counsel established a prima facie case of an 8(a)(1) violation with regard to Payne's suspension by showing that: she called Hockenberry on the authority of Lancaster regarding working conditions,[19] that, as shown by General Counsel Exhibit 30, Respondent knew she was acting in concert with Lancaster and that her suspension was motivated by the telephone call, *Amelio's*, 301 NLRB 182 (1991). Respondent has offered no evidence to rebut the prima facie case.

Payne's complaint does not lose its protected status by her failure to go through Dinwiddie before seeking redress from Hockenberry.[20] I can find no cases that explicitly state that an employer cannot retaliate for otherwise protected activity because an employee ignored an employer's chain of command. However, there are a number of cases that implicitly stand for this proposition. In *Oakes Machine Corp.*, 288 NLRB 456

[17] In its Br. at pp. 252–253, Respondent argues that allegations should be dismissed with regard to shift and partner changes with regard to Michael Durbin, David Walker, and Darrell Lancaster. GC Exh. 14 establishes that compared with the February 21 schedule, the following changes occurred with regard to these three employees: Durbin was moved from a 7:30 a.m.—11:30 p.m. BLS shift to an 8 a.m.—4 p.m. ALS shift with Dennis Wade; Lancaster's hours changed and Brenda Thompson became his partner, replacing Glen Zogelman; Walker's partner changed from Marietta Coakley to Roger Brumley. While Walker and Durbin never testified, Dennis Wade's testimony credibly establishes that all the employees named in the complaint had demonstrated support for the Union by attending at least three union meetings. I infer that Respondent was aware of their attendance by virtue of the fact that it posted supervisors across the street from the IBEW hall during many or all of the Union's preelection meetings.

On the other hand, I dismiss the allegation in pars. 6(aa) and (dd) with regard to Norman Byers, who did not work for Respondent after March 1, 1999.

[18] Both Payne and Lancaster openly supported the Union.

[19] Respondent argues at pp. 156–157 of its brief that Payne did not complain to Hockenberry about "wages, hours and working conditions" because she did not specifically tell Hockenberry what issues she wanted to discuss. I reject this argument because it is quite apparent that Payne was calling to complain about working conditions and that Hockenberry and Dinwiddie were aware of this fact. If they thought that Payne's call was not work-related, Hockenberry would not have called Dinwiddie and Dinwiddie would not have disciplined Payne for insubordination.

[20] Payne complied with the terms of Respondent's handbook by raising her concerns first with Tierney.

(1988), for example, the Board found an 8(a)(1) violation where an employer discharged an employee for sending a letter to the parent company asking it to remove the company's president, see also *Puerto Rico Sheraton Hotel*, 248 NLRB 867 (1980); *Memphis Chair Co.*, 191 NLRB 713 (1971).

Changes in Cynthia Payne's Work Schedule and Her Resignation

Darrell Lancaster and Cynthia Payne had been partners ever since Respondent acquired the Owensboro EMS contract in March 1998. They worked a night shift from 10 p.m. until 6 a.m. until February 21, 1999, when they were separated and assigned to the day shift.

Payne was paired with Kay Phillips, working two 16-hour shifts from 7 a.m. until 11 p.m. and one 8-hour shift from 3 or 3:30 until 11 p.m.

On February 19, the day Payne learned of her shift change, she called David Dinwiddie and asked him why her shift was changed. Dinwiddie replied the change was made because she was hostile to supervisor Jason Tierney. Payne denied this and then told Dinwiddie that her babysitter could not keep her children after 3:30 p.m. Dinwiddie responded by saying that he would accept her resignation.

Dinwiddie admitted that part of the reason for moving Payne to the day shift was her call to Sherman Hockenberry (Tr. 1694). This is essentially a concession that the shift change was in retaliation for protected activity and therefore violative of Section 8(a)(3) and (1), as alleged in complaint paragraphs 6(i) and (n). Implicit in her discussion of her babysitting problems with Dinwiddie was a request for a return to the night shift. In view of Respondent's expressed desire to get rid of union supporters and the lack of any convincing reason proffered for not accommodating Payne, I conclude that Respondent also violated the Act, as alleged in complaint paragraph 6(l) by denying the request to return to the night shift. This conclusion is reinforced by the fact that within a week or week and a half of Payne's discussion with Dinwiddie, Norman Byers, who had been working days until February 21, asked for a return to the day shift. Instead of accommodating Payne and Byers, both open union supporters, Dinwiddie declined to accommodate either, knowing that in doing so it was reasonably likely they would have to quit.

Payne was able to get her sitter to keep her children until 5 or 5:30 p.m. and continued to work for Respondent. On Sunday night, February 21, 1999, Payne called the Yellow facility and spoke to Supervisor Marietta Coakley. She told Coakley that she would be 2 hours late for the 3–11 p.m. shift she was scheduled to work the next day.[21] Coakley told her that would be fine. A few hours later, Terry Dossett called and told Payne not to come to work at all because it would create 2 hours of overtime.[22]

Starting March 14, Payne was reassigned from an ALS unit to a BLS unit, which is much less interesting, working 9 a.m. to 5 p.m., Monday through Friday. Payne again told Dinwiddie that the schedule caused her problems with her babysitter and asked to be moved back to the night shift. She told him that several employees working the night shift had told her they would be willing to swap shifts with her. Dinwiddie told her there was no opening for her on the night shift.

From March to May 1999, Payne told Dinwiddie on several occasions that at the end of the school year, her sitter would not watch both of her children. In May, she made a written request for a return to the night shift, or alternatively two 16-hour and one 8-hour shifts. Dinwiddie refused to accommodate her.[23]

Payne then asked Dinwiddie if she could switch from full-time to part-time employment. Dinwiddie told her she would have to fill out an application. Payne declined to do so. She asked why two part-time employees had been moved into the day shifts she was requesting. Dinwiddie refused to give her a reason. At that point, Payne submitted a letter of resignation. Dinwiddie told her that unless she gave him 2weeks' notice, she was not eligible for rehire.[24]

I conclude that Respondent constructively discharged Payne in refusing to either return her to the night shift or give her two 16-hour and one 8 hour shifts. The test for constructive discharge is:

> First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities.

Crystal Princeton Refining Co., 222 NLRB 1068, 1069 (1976).

Both Payne's transfer to the night shift in February and Respondent's refusal to accommodate her babysitting problem were motivated by her union and protected concerted activities. They were intended to cause her resignation and it was reasonably foreseeable that forcing Payne to work five 8-hour day shifts would have that result. In *American Licorice Co.*, 299 NLRB 145, 148 (1990), the Board found a constructive discharge in virtually identical circumstances. In *American Licorice* the employee had told her employer that she could not work the day shift because she could not afford a babysitter.

[21] I infer from Payne account of Coakley's response and her conversation with Dossett, that she told Coakley that her son had chickenpox and that she had to wait for her husband to get home before coming to work.

[22] This is alleged as an 8(a)(3) and (1) violation in complaint par. 6(o). The complaint also alleges a violation on the grounds that Respondent issued Payne an unexcused absence. As Respondent contends, R. Exh. 15 indicates that the absence was not unexcused.

I dismiss this portion of the complaint because there is insufficient evidence to support an inference of discriminatory motivation. The General Counsel's case is based on the fact that originally Payne was told she could come in late and her testimony that other unnamed employees were allowed to do so.

[23] I credit Payne's testimony over that of Dinwiddie and find that Respondent never offered Payne the opportunity to return to the night shift. GC Exh. 6 establishes to my satisfaction that Payne's testimony at Tr. 2100 is more credible that Dinwiddie's testimony at Tr. 1745–1746. GC Exh. 6 indicates that, consistent with her testimony, Payne worked the day shift on May 17, 1999, and was scheduled to work the day shift throughout that week (also see GC Exh. 14).

[24] Payne testified that she could not give 2 weeks' notice because school ended the next week.

The employer refused to transfer her to another shift and she resigned.

The instant case is materially indistinguishable from *American Licorice*—other than by the fact that Payne could have become a part-time employee. In this regard the Board has held that an offer of continued employment only at reduced hours constitutes constructive discharge, *Kostel Shoe Co.*, 124 NLRB 651 (1959). Assuming that an offer to continuing working as a part-time employee may in some circumstances not constitute constructive discharge, it does so in the instant case, where it was evident in May 1999 that part-time employees would be offered very little work by Respondent. Additionally, by switching to part-time employment, Payne would have lost her health insurance coverage and entitlement to vacation and holiday pay.[25]

Constructive Discharge of Norman Byers
(Complaint par. 6(gg))

In January 1999, Norman Byers and his wife, Lisa, separated. Byers, who was working two 16-hour and one 8-hour shifts for Yellow, applied for a job driving a truck a night. On the work schedule for the period February 21—March 13, 1999, Byers was switched to 11 p.m. to 7 a.m. night shift. He was also scheduled to work nine consecutive nights.

When he was offered the night trucking job, Byers went to David Dinwiddie and told him that he wanted to return to the day shift. He explained that he needed the second job to pay his bills and child support and that since he generally worked only on three days, he would be able to keep his son while his wife worked on the other days. Dinwiddie refused to make the change despite the fact, as set forth above, that he knew that Cynthia Payne wanted to be switched back to nights because of her babysitting problem. For the same reasons I concluded that Respondent constructively discharged Payne, I conclude that it constructively discharged Norman Byers.[26]

Alleged Discharge of Nancy Baker
(Complaint par. 6(bb))

Nancy Baker, began working for Yellow as a dispatcher in February 1998, and became an EMT upon reaching the age of 21 in January or February 1999. She was assigned to a BLS unit working 8 a.m. to 4 p.m. At the time of this assignment, Baker told David Dinwiddie that she could not work nights, although she did not explain why.

Baker openly supported the Union by affixing a sticker to the rear of the vehicle she parked in Yellow's employee parking lot and using a coffee mug and pens at work that bore the union logo. She also failed to lend support to Yellow in its effort to discipline Kay Phillips for not using Med 99, the ambulance with bald tires, in January. I infer that Respondent was aware of Baker's union sympathies.

Baker accepted a job working nights at the Owensboro hospital on February 24, 1999. She did not inform Respondent that she had this job. For the schedule starting March 14, Baker was switched to night shifts as a relief driver on ALS units. This was the same schedule on which Cynthia Payne, who had told Dinwiddie of her babysitting problems with day shift work, was switched to a BLS unit, which operated only during the day.

On March 12, Baker, who was ill, called Office Manager Debbie McDaniel and asked her if another employee could bring Baker her check. McDaniel informed Baker that she would have to come to the office and get it herself. When Baker picked up her check she noticed that for the second pay period in a row, the check did not contain a raise which she had been led to expect from conversations with Daniel Jacobs and Lisa Byers.

Baker went to see David Dinwiddie to complain about the lack of a raise. Dinwiddie told Baker that all wages were frozen pending negotiations between Respondent and the Union. Baker then reminded him that she could not work night shifts, although it is not clear whether she mentioned her job at the hospital. Baker asked Dinwiddie if she could swap shifts with other employees. Dinwiddie said she could not.

Baker stormed out of Dinwiddie's office and he followed her to her car. He asked her to return to his office and she refused. Baker testified that Dinwiddie then told her that she no longer worked for Respondent. Dinwiddie denies this. I am unable to credit Baker's account of this conversation over that of Dinwiddie.

On May 14, Supervisor Marietta Coakley called Baker and told her that she was expected at work that evening. Baker told her she could not come to work that night because she was scheduled to work at the hospital. She never worked for Respondent again. On the basis on this evidence I conclude that the General Counsel has not established that Respondent terminated Nancy Baker. I therefore dismiss complaint paragraph 6(bb).

Constructive Discharge of Brian Kendall
(Complaint pars. 6(nn) and (oo))

EMT Brian Kendall, was an open union supporter, who prior to March 14, 1999, had been working two 16-hour and one 8-hour days shifts. His ambulance partner for over 9 months had been Scott Hedrick. Beginning on March 14, Kendall was paired with James Dukes and his 8-hour shift was a night shift, instead of a day shift. Kendall went to David Dinwiddie and asked that the schedule be changed due to a babysitting problem. Dinwiddie told him to swap shifts and possibly he would schedule him exclusively on days on the next 3-week schedule.

When the schedule for April 4—25 came out, Kendall was again scheduled for one 8-hour night shift per week. On April 5, Kendall wrote Dinwiddie asking to put on a part-time sched-

[25] A similar case is *NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1049 (4th Cir. 1997) enfg. *Grand Canyon Mining Co.*, 318 NLRB 748, 760 (1995). In this case the employer moved a union supporter to the night shift with prior knowledge that he did not have transportation to get to work at night.

[26] In view of the above finding, I find it unnecessary to decide whether Respondent violated the Act in denying Norman Byers the opportunity to work part time as alleged in complaint par. 6(ll)(i). I also dismiss pars. 6(ee) and (ll)(ii). I find the evidence insufficient to establish discriminatory motivation when Respondent denied Norman Byers a 2-day excused absence to attend the funeral of two cousins. With regard to requiring a new application from employees who wanted to switch from full time to part time, the General Counsel has not established how this affected employees adversely in any material way.

ule, citing among other things, his babysitting difficulties. Dinwiddie told Kendall that he had to fill out a new employment application to be a part-time employee. He did so. Kendall did not work again for Respondent. He was called by Lisa Byers once in April for a night-shift assignment that he turned down for lack of childcare. Byers asked him what days he would be available to work and Kendall gave her 4 or 5 days. She never called him back.

I conclude that Respondent constructively discharged Brian Kendall. Dinwiddie rescheduled Kendall for a night shift because he knew that Kendall would be unlikely to continue working as a full-time employee, if he did so. Moreover, I conclude that it was the conflict between Kendall's childcare situation and his night-shift assignment that made it extremely difficult for him to remain a full-time employee. The offer of part-time employment to Kendall, which would have resulted in reduced hours and loss of benefits, does not, as the Board found in *Kostel Shoe Co.*, supra, negate the constructive discharge consummated by forcing Kendall to surrender his full-time position.

Respondent Violated Section 8(a)(3) and (1) by Refusing to Rehire Brian Kendall

Board Precedent Allows, and Indeed Requires, Consideration of Respondent's Refusal to Rehire Brian Kendall

At page 3 of its brief, footnote 3, the General Counsel requests that the judge find violations, where appropriate, when the record establishes violations which were not alleged in the complaint. At page 42, footnote 50, the General Counsel argues that Respondent's refusal to rehire Brian Kendall in May 1999, violated Section 8(a)(3) and (1). It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated, *Williams Pipeline Co.*, 315 NLRB 630 (1994); *Meisner Electric, Inc.*, 316 NLRB 597 (1995); *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

The criteria set forth in the above-cited cases have been satisfied with regard to Respondent's refusal to rehire Brian Kendall. The violation is closely related because it is proximate in time to many other allegations in the complaint, including those alleging the constructive discharge of Kendall the month before. The evidence with regard to Kendall's union activities, Respondent's knowledge of those activities and animus is the same evidence that supports complaint paragraphs 6(nn) and (oo). The only additional evidence is that pertaining to Respondent's refusal to rehire Kendall and the reasons for that refusal.

I also conclude that the violation was fully litigated. Respondent did not object to Kendall's testimony regarding his efforts to get his job back in May and Yellow's response (Tr. 607–614). Moreover, Respondent elicited a detailed explanation from David Dinwiddie and Office Manager Debbie McDaniel as to why Respondent refused to consider Kendall for reemployment (Tr. 1704–1708, 1950–1959). Finally, Respondent addressed the reasons it refused to rehire Kendall in its posthearing brief at pages 103 and 110.

The Record Establishes that Respondent Violated Section 8(a)(3) in Refusing to Rehire Kendall

After he ceased working for Yellow on about April 9, Brian Kendall worked 36 hours a week for a dialysis center until May 1999. Then he was laid off. In May, Kendall asked Respondent to rehire him. Office Manager Debbie McDaniel told Kendall that Respondent was trying to work mainly with full-time employees and that part-time work would be somewhat limited. She also told him that there were full-time positions available. Kendall then filled out an application for such a position and asked McDaniel to set up an interview with David Dinwiddie. An appointment was made and then canceled by Respondent. The interview was not rescheduled and Yellow did not respond to Kendall's employment application.

Respondent contends that Kendall is ineligible for rehire because he failed to comply with a company policy requiring employees to give it 2 weeks' notice before quitting. David Dinwiddie testified that he apprised Kendall of this policy on April 5, and the fact that he would be ineligible for rehire as a result of his noncompliance. I do not credit Dinwiddie's testimony in this regard.

There is no reliable evidence that Respondent had a policy requiring 2 weeks' notice for either a resignation or a request to switch to part-time status—other than the ad hoc determinations made by Dinwiddie to get rid of union supporters. There is also no evidence that Respondent had a policy requiring that employees desiring a change from full-time to part-time status fill out a new employment application. Certainly, Respondent never widely communicated any such policies to its employees. Indeed, even when it supposedly applied these policies to effectively bar union supporters from future employment, Respondent did not communicate them to other employees (Tr. 203–204). In this regard I find that Dinwiddie did not tell Kendall about the requirement of 2 weeks' notice in April. The fact that the documentation regarding this policy (R. Exh. 13) is dated a week after Kendall's last day of work and is not signed by Kendall, leads me to credit his testimony in this regard over that of Dinwiddie.

The fact that adverse personnel decisions were taken against union supporters on the basis of policies of which they had no prior notice is a strong indication of discriminatory motive, *Lowe's Co.*, 266 NLRB 653, 654 (1983); *Roadway Express, Inc.*, 242 NLRB 716, 720 (1979). This is all the more true since there is no indication that these policies were ever relied upon to deny employment to persons who did not openly support the Union. Indeed, when employee Michael Obenhausen quit, apparently due to anticompany comments by Darrell Lancaster, Respondent not only failed to apply the 2-week notice rule, but encouraged him to retract his resignation (Tr. 1695).[27]

[27] David Dinwiddie testified that Obenhausen quit (Tr. 154, 1695) and told Lancaster that an employee "was resigning" (Tr. 1080). GC Exh. 28, the written warning issued to Lancaster, states "Mr. Lancaster [sic] crew partner resigned over the shift." Dinwiddie's inconsistent testimony at Tr. 1798 is not credited.

Another indication of Respondent's disparate application and enforcement of its alleged notice rule is Office Manager Debbie McDaniel's testimony that, "*Most usually*, if they fail to give a 2-week notice, they would not be subject to rehire (emphasis added) (Tr. 1951–1952).

Finally, I decline to credit Dinwiddie's rationale for refusing to rehire any employee who failed to give 2 weeks' notice. He testified that this failure caused Respondent to pay other employees overtime pay. Other than his bald assertion, there is no evidence to support this proposition.[28] The record indicates that Respondent generally could replace its scheduled employees with part-time fill-in employees with very little advance notice (see, e.g., Tr. 2021, 2049–2054). In summary, I conclude that Respondent's refusal to rehire Kendall was discriminatory motivated, I draw this inference from a variety of factors, including the pretextual nature of Respondent's explanation and the disparate treatment of Kendall as compared to Michael Obenhausen.

The Discharge of Renee McKinney on February 23, 1999

Renee McKinney worked for Yellow Ambulance as a dispatcher and an EMT. She signed a union authorization card and during the organizing campaign displayed a union sticker on the back windshield of the vehicle which she parked at Respondent's facility. She also openly displayed a union coffee mug in the dispatcher's office.

On one occasion in February 1999, McKinney was using a pen with the union logo to fill out an official run form. Russ Walkosak took her pen and threw it on a table and said that he wasn't going to have any of that union shit around here.[29]

On Friday, February 21, 1999, McKinney was working in the dispatch office. She learned that Carvella Coomes, an EMT on light duty, had been assigned to work as the dispatcher the next day, Saturday, February 22. McKinney volunteered to work part of Saturday to assist Coomes. Lisa Byers, Respondent's dispatch supervisor, asked McKinney how long she could stay. McKinney replied she could stay until 12 or 1 p.m. Byers replied that however long McKinney could stay would help Respondent out, so that Coomes would not be alone the entire day.[30]

McKinney reported to work on February 22, and shared the dispatcher's duties with Coomes. At about 11 a.m., paramedic Danny Wilson, who was scheduled to work the night shift (starting 11:30 p.m.) called to say that he could not come to work because his child was ill. McKinney testified that she wrote a note for supervisor Bruce Nanney, who was out of the office on an ambulance run, and put it up on the wall. Nanney did not get such a note.[31] McKinney did not cross Wilson's name off the daily schedule. She clocked out at about noon but stayed until 12:20 to assist Coomes. As a result of McKinney's failure to notify Nanney that Wilson was not coming to work, Nanney stayed at work well beyond his scheduled departure until a replacement for Wilson came to work.

On the afternoon of February 20, Nanney wrote up a disciplinary form suspending McKinney for 3 days. On the morning of February 23, when McKinney arrived at work she was summoned into David Dinwiddie's office. Dinwiddie handed her two disciplinary forms and an incident report and fired her. Dinwiddie testified that he decided to terminate McKinney because of the two incidents of misconduct by her on February 20. The next day, February 24, was the day of the NLRB representation election. Rene McKinney attempted to vote but was told by Russ Walkosak that since she was no longer an employee she was not allowed in Respondent's facility.

McKinney's discharge must be considered in the light of Respondent's stated intention of terminating union supporters, its motive in terminating her the day before the election, its failure to adequately establish one of the proffered reasons for her discharge and its demonstrated willingness to fire union supporters, such as James Hardin (see below), for obviously pretextual reasons. Viewing the record as a whole, I conclude that the General Counsel has established a prima facie 8(a)(3) and (1) violation. Respondent has not satisfied its burden of proving that it would have terminated McKinney even if she had not shown support for the Union.

For the same reasons that I affirm complaint paragraph 6(q) regarding McKinney's discharge, I affirm paragraph 6(p) regarding the two written warnings issued to her on February 23, 1999. I conclude that Respondent has not rebutted the General Counsel's prima facie case of discriminatory motivation for the first warning (GC Exh. 51) alleging that she left work early.

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[28] In the 2 weeks following Kendall's resignation, his place on most of his scheduled shifts was taken by David Walker, who was moved from a BLS unit. Walker did not work the BLS shifts in addition to what had been Kendall's shifts (see GC Exhs. 6 and 14).

[29] McKinney's account of this incident is not contradicted by Walkosak. I also credit the uncontradicted testimony of Brian Kendall that in February 1999, Walkosak put Kendall's union coffee mug in the trash and said that there was no reason for Kendall to bring union stuff into the facility and "rub it" in Yellow's face.

[30] As noted previously, Lisa Byers, who still works for Respondent, was not called as a witness. Brenda Thompson, another supervisor, who worked in dispatch on February 19, did not testify about this conversation at all. I therefore credit McKinney's uncontradicted account. Instead of presenting witnesses with first-hand knowledge regarding McKinney's alleged commitment to work until 1 p.m., Respondent relied exclusively on hearsay testimony from Director David Dinwiddie (Tr. 1750–1751) and Senior Street Supervisor Bruce Nanney (Tr. 2047–2049). Indeed, even Dinwiddie's testimony reflects uncertainty about what Byers allegedly told him, e.g., "I think she said from 7:00 to 1:00 that's what she told me." (Tr. 1750, lines 11–13.) In the absence of testimony from available supervisory employees with first hand knowledge I decline to give any credit to Dinwiddie's or Nanney's testimony as to whether McKinney committed to work until 1 p.m. In the absence of such corroborating evidence, I also decline to give any credit to testimony as to what Byers, Debbie McDaniel, or Carvella Coomes told Dinwiddie and/or Nanney about McKinney agreeing to stay until 1 p.m.

Finally, McKinney's account of her conversation with Byers is more logical than Respondent's hearsay account. Coomes was to be working in the dispatch office by herself from 1 to 6 p.m. Thus, it is difficult to understand why it would have been so important to Respondent that McKinney stay until 1 p.m. as opposed to leaving at noon.

[31] In September 1998, McKinney and other dispatchers received a memorandum from Lisa Byers which stated:

> If someone calls off duty make sure you call me, if you are unable to get me then go ahead and try to cover it by calling part time employees and then check the schedule and find out who is extra on any other shift and call them in instead of overtime. Or contact shift supervisor [the last phrase is a hand-written addition to the typed memo, [R. Exh. 26].

McKinney concedes that she did not attempt to notify Byers that Wilson had called off duty and that she did not try to find a replacement for him.

Respondent could have legitimately imposed a lesser form of discipline on McKinney for failing to effectively notify Nanney of Wilson's absence. However, since the termination was in part predicated on a prior discriminatory warning, it constitutes a violation of the Act.

The Assessment of a $50 Charge for Employees Taking the Transitional Course for EMTs

To maintain their state certification, all EMTs in Kentucky were required to take a "transitional course" to update their skills so as to meet certain national standards. In December 1998, Sherman Hockenberry announced to employees that this course would be offered free of charge. Shortly thereafter, Respondent posted a memo to that effect.

On February 25, 1999, the day after the Union won an overwhelming victory in the NLRB representation election, Respondent posted another memo informing employees that they would have to pay Yellow Ambulance $50 each for the course. The memorandum also advised employees that the course would most likely be offered only once before the July 1999 state-imposed deadline for completing the course.[32]

Respondent offers no explanation for the suspicious timing of the February 25 memo. However, David Dinwiddie testified that the $50 charge was necessitated by the unavailability of Yellow's only in-house instructor. First of all, Respondent has not established that the in-house instructor was not available anytime between December 1998 and July 1999. More importantly, Terry Dossett's testimony establishes that Dinwiddie's explanation for the $50 per student charge is pretextual.

Dossett obtained the services of Austin Riley to teach the transitional course at Yellow. Riley charged Yellow $15 per hour to teach this course. He was not reimbursed for any other expenses. The course ran for 25 hours which means that it cost Respondent $375 for Riley's services.[33] The only other expense to Yellow was for books and Respondent at no time justified the charge to employees on the basis of the cost of books. Dossett testified that between 15 and 25 employees attended the transitional course. This means that Respondent collected between $750 and $1250 from employees for the course, far in excess of what it cost them to retain Austin Riley. On the basis of the timing of the $50 charge and the pretextual nature of Respondent's explanation for it, I conclude that the $50 fee was assessed in order to retaliate against employees for voting for the Union.[34] Therefore, I conclude that Respondent violated Section 8(a)(3) and (1) as alleged in complaint paragraph 6(u).

Requirement for Employees to Sign a Document Promising to Reimburse Respondent for Missing Company-Issued Clothing Items (Complaint Pars. 5(gg), 6(t), (qq), and 7(q))

On February 25, 1999, the day after the Union's victory in the NLRB representation election, employees found a form relating to company-issued coats, raincoats, and shirts in their pay envelopes. The form states that the employees understand that if they fail to return the items issued to them upon resignation or termination, the cost of these items will be deducted from their last paycheck.

James Hardin, who had served as a union observer the day before, did not sign the form he received. He listed the items he had been issued on the form and wrote a note that he would like to have prices on the items before he promised to pay for them. Hardin then placed the form in a basket in the dispatch office.

On March 8, Hardin was approached at lunchtime by Supervisor Brenda Thompson. This was a few hours after Hardin had an accident in the Owensboro hospital parking lot, for which he was subsequently terminated on March 19 (see discussion below). Thompson presented Hardin with another copy of the form and told him that David Dinwiddie had sent her to find him and get him to sign the form immediately. Thompson told him that if he did not sign the form he would have to turn in all the clothing items he was issued and buy his own.

Respondent contends that in requiring Hardin to sign this form, it was merely following a longstanding policy. I do not credit this testimony. To the contrary, I conclude that the first time these forms were issued was on February 25, and this was, as alleged in complaint paragraph 6(t), another effort to communicate to employees that they would pay a price for voting for the Union.

The General Counsel asked David Dinwiddie at one point whether there were other such documents predating the one signed by Hardin on February 25. Dinwiddie said there were, but Respondent never produced any such documents. Additionally, I conclude that it is not a coincidence that Dinwiddie demanded that Hardin sign the document a few hours after the March 8 accident. It is another indication that Respondent was intending to seize upon this accident as an excuse for firing Hardin and that the testimony, that he was fired pursuant to a nondiscriminatory deliberation by a safety committee in Louisville, is completely fabricated.

While I affirm complaint paragraph 6(t), I dismiss paragraphs 5(qq) and 6(qq), because there is no evidence that Thompson threatened Hardin with discharge. I find it unnecessary to decide whether requesting employees to sign the form also violated Section 8(a)(5) as alleged in paragraph 7(g), particularly since the issue was not briefed by any party.

Implementation of a New Dress Code

During the first week of March 1999, Respondent posted a new dress and personal appearance code (R. Exh. 2) on the employee bulletin board at its Owensboro facility, without previously notifying the Union or offering it an opportunity to bargain.[35] This dress code differed in a number of respects the one previously in force pursuant to the Yellow Handbook (GC Exh. 4). For example, it required male employees to have their hair cut short enough that it would not touch their collar. Russ Walkosak told paramedic Roger Brumley that he would have to

[32] The course was apparently conducted in April 1999.

[33] Dossett's testimony indicates that Dinwiddie's testimony at Tr. 321, that the instructor cost Yellow $800, is inaccurate.

[34] Moreover, Cynthia Payne's testimony that Supervisor Terry Dossett told her that the charge for the course was the result of the union election victory, is uncontradicted.

[35] David Dinwiddie testified that R. Exh. 2 is a page out the standard operating procedure. I am unable to find such a document in either GC Exh. 3 or GC Exh. 5 and neither could Dinwiddie. I therefore conclude the R Exh. 2 reflects a new policy initiated in March 1999.

get his hair cut to conform to new code or he would not be allowed to work. When Brumley went to David Dinwiddie on the matter, Dinwiddie told him he had to get his hair cut within a few days.

The new dress code also prohibited the wearing of earrings by male employees. Roger Brumley, who had worn an earring in his left ear for some time, removed it to conform to the new policy. With regard to outer clothing, the new dress code allowed employees to wear sweaters or similar garments if they were dark blue, approved by the Dinwiddie and had the Yellow Ambulance patch sown onto them. The Yellow handbook, which had in force previously, prohibited the wearing of civilian clothing with any part of the company uniform. However, this prohibition was not enforced.

Upon seeing the new dress code, Amy Brumley went to Dinwiddie, asked him to approve her use of a hooded jacket and offered to sew a company patch onto the garment. Dinwiddie denied her request without explanation. He has approved the use of similar garments by other employees for whom there is no evidence of union support. As Respondent has not offered a nondiscriminatory explanation for the implementation of the new dress code shortly after the Union's election victory, I conclude that Respondent violated Section 8(a)(3) and (1) both in implementing the dress code and in applying it to Amy Brumley.

Additionally, as alleged in paragraph 7(j) and 11 of the complaint, Respondent violated Section 8(a)(5) and (1) in unilaterally implementing a new dress code without notifying the Union and offering it an opportunity to bargain over these changes. The duty to bargain attaches, at least in the sense of prohibiting unilateral changes, as of the election date, *Celotex Corp.*, 259 NLRB 1186, 1193 (1982). Since implementation of a dress code is a mandatory subject of bargaining, Respondent's unilateral implementation of a new dress code after the Union's election victory of February 24, 1999, violated Section 8(a)(5) and (1), *Transportation Enterprises*, 240 NLRB 551, 560 (1979), enfd. in relevant part 630 F.2d 421 (7th Cir. 1980).

Respondent Freezes Wages Following the Election (Complaint Paragraph 6(r))

In March 1998, Sherman Hockenberry met with new Yellow employees, who had just transferred from the Owensboro hospital EMS. He informed them that they would receive an evaluation on the anniversary date of their hire and a raise, depending upon the results of that evaluation.[36] At least some Yellow employees received such evaluations and prior to the election some received wage increases. Following the election, Respondent declined to give at least some employees an annual wage increase and may have stopped giving annual evaluations as well.[37]

An employer, who withholds pay raises from employees who have chosen a union as their bargaining representative, violates the Act if the employees otherwise would have been granted the raises in the normal course of the employer's business, *Florida Steel Corp.*, 220 NLRB 1201 (1975), enfd. 538 F.2d 324 (4th Cir. 1976); *Choctaw Maid Farms*, 308 NLRB 521, 527 (1992). I conclude that Respondent violated Section 8(a)(3) and (1) in denying wage increases to employees, who would have otherwise received them, had not they selected the Union as their bargaining representative.

The Discharge of Richard Turner

Richard Turner is a paramedic who worked for Yellow from August 1997, when it purchased Arrow Ambulance, until March 4, 1999, about a week after the election. During his employment with Yellow, Turner was disciplined on a number of occasions, including suspensions in July and September 1998.

Turner filled out a union authorization card and affixed union stickers to the back windshield of the vehicle he drove to work. He used a coffee mug with a union logo on it in his ambulance at a time when his partner was a supervisor, Brenda Thompson. In mid-November 1998, dispatch Supervisor Lisa Byers warned Turner to be careful because his name came up at a supervisors' meeting as one of the employees the Company was looking to get rid of because of the union campaign.[38]

At one point, Jason Tierney, then a Yellow supervisor, asked Turner for some material about the Union and suggested employees put the organizing campaign on hold to give David Dinwiddie a chance to straighten things out. Turner told Tierney that he was not willing to do so.[39]

In February 1999, Turner was switched from the day shift to night shift. He and his partner, Norman Byers, were scheduled to work nine consecutive shifts (11 p.m. to 7 a.m.) beginning February 24.[40] David Dinwiddie testified that this schedule was the result of inadvertence. I do not credit this testimony because the only employees who were scheduled for nine straight shifts were open union supporters; Turner, Norman Byers, Kay Phillips, and Amy Brumley. Moreover, Turner complained to supervisor Bruce Nanney about being scheduled for nine straight nights (Tr. 1297). This conversation occurred prior to March 4, the night Turner was fired. Despite this, union supporters Kay Phillips and Amy Brumley were scheduled for nine consecutive nights on the schedule beginning March 14. In light of Nanney's conversation with Turner, I conclude this was not due to inadvertence. Rather, these employees were scheduled for nine consecutive shifts to retaliate against them

[36] I do not credit Kay Phillips' testimony that employees were promised a 50- to 75-cent raise.

[37] Amy Brumley, for example, asked for an annual evaluation, but was never informed that one had been performed. GC Exh. 54 purports to be such an evaluation performed by Supervisor Bruce Nanney. It is not signed by Brumley and there is no indication on the face of the document that she ever saw it.

Nancy Baker's testimony that she received an excellent evaluation from Lisa Byers is uncontradicted. Had Respondent not acted in a discriminatory manner both Baker and Amy Brumley would have received a raise, although it is not clear how much of a raise.

[38] I credit Turner's testimony regarding this conversation. Respondent did not call Lisa Byers to refute his account.

[39] Tierney is apparently no longer a supervisor, but still works for Respondent as a rank-and-file employee. He did not testify at the hearing.

[40] February 24 was the day of the NLRB representation election. The schedule was prepared by David Dinwiddie somewhat before that.

for their union activities and to retrain, coerce, and interfere with their statutory rights.[41]

At about 2 a.m. on his March 2–3 shift, Turner and his partner, Todd Felker were in their ambulance at a spot designated as post 4. Yellow's dispatcher called them on the radio and instructed them to move to a different location, designated as post 10, because the ambulance at post 10 had gone to answer a call.

Turner and Felker proceeded towards post 10 and radioed the dispatcher that they were in the area. They then went to a nearby park, which they were allowed to do.[42] At about this time, Director Dinwiddie and Supervisor Jason Tierney drove out to the post 10 area looking for them. Dinwiddie told the dispatcher to ask Turner for "his exact location." After a very brief delay and possibly a second call, Turner informed the dispatcher that he was in the Kroger's parking lot. When he gave this information, Turner and Felker were not in the Kroger parking lot but were on their way to the lot and were approximately one-fourth mile away. Dinwiddie and Tierney drove into the Kroger lot and saw Turner and Felker arrive within minutes or possibly seconds.

Normally, when an ambulance is called by the dispatcher, they are sent on run or moved to a different location. After getting the dispatcher's call initiated by Dinwiddie, Turner and Felker were told to return to Respondent's facility where Dinwiddie interrogated them separately and had them draw maps showing where they had been when the dispatcher called.

During his March 3 interrogation of Turner, Dinwiddie told Turner that on February 21, Turner had not been at his post for a period of 3-1/2 hours. Dinwiddie told Turner that on his next shift he would have him sign a document stating that he would let the dispatcher know of every move he made.[43]

After these interrogations, Turner and Felker completed their shift. Later during the shift, or on his next shift, Turner saw Jason Tierney at the OB ward at the Owensboro Hospital. Tierney told Turner that the stricter requirements for notifying the dispatcher of an employee's location was a new policy that would apply to everyone and that Turner should not worry about it. Tierney said the policy was being implemented because Dinwiddie regarded the vote in favor of the Union to be a personal slap in the face.

Turner worked a 16-hour shift from 7 a.m. to 11 p.m. on March 4, 1999. At the end of the shift, Dinwiddie summoned him into his office and fired him. The disciplinary form that Dinwiddie read to Turner (R. Exh. 21) recited "Numerous incidents in file. Oral warning on February 23, following the failure to report to post for 3-1/2 [hours] on February 21. The numerous occurrences of failure to post, delaying posting, improper posting, and falsifying a report on posting has result [sic] in termination."[44]

I conclude that the stated reasons for Turner's discharge are pretextual. There is no indication that Turner's failure to give his "exact" location was a material violation of Respondent's rules—given the fact that he appeared in the Kroger parking lot within a very short time of telling the dispatcher that he was at Kroger's. Moreover, his termination notice relies on an oral warning which I conclude was not given to Turner and his termination occurred pursuant to Respondent's stated intention of looking for a way to get rid of him for union activity.[45]

Respondent's Refusal, on March 12, 1999, to Allow Kay Phillips and Cynthia Payne Permission to use a Bathroom Other than the One at Hardee's and Refusal of their Request to Take a Lunchbreak[46]

On or about March 12, 1999, Kay Phillips and EMT Cynthia Payne were working a 16-hour shift from 7 a.m. until 11 p.m. Several hours into the shift one of them contacted the Yellow dispatcher and requested to leave their post to use a restroom at a gas station approximately a mile from their post. The dispatcher denied the request. After Phillips renewed her request, the dispatcher instructed Phillips and Payne to use the bathroom

[41] The General Counsel alleged that the nine consecutive work days (or nights) was an 8(a)(3) and (1) violation with regard to Byers, Turner, Phillips, and Amy Brumley, see complaint pars. 6(s), (z), and (hh). I affirm pars. 6(s) and 6(hh). Par. 6(z) is dismissed because Byers did not work for Respondent after March 1.

[42] At this time employees were allowed to "roam" within a distance of 1-1/2 miles of their assigned post.

[43] I credit Turner's testimony over that of David Dinwiddie to the effect that Dinwiddie never talked to him about his conduct on February 21, until the morning of March 3. Dinwiddie's account at Tr. 1656–1657 is simply not consistent. Dinwiddie testified that the shift during which he went to the Kroger parking lot was the shift immediately after he told Turner he would have to let the dispatcher know of his whereabouts at all times. As GC Exh. 14 shows, Turner worked a number of shifts between February 21, and March 2–3. Moreover, given Respondent's newly imposed policy that all oral warnings would be documented, I conclude that the failure of Respondent to produce written confirmation of an oral warning given to Turner after February 21, establishes that no such oral warning was given to him and that February 21, was not discussed with Turner until March 3.

Turner concedes that he was not at his post for an extended period of time on February 21. He was not required to be at his post. I credit his testimony that no attempt was made to contact him on the ambulance radio during this period. There is no contradictory evidence on this issue.

Finally, Norman Byers, who was Turner's partner on February 21, was not disciplined for his conduct that evening. There is no evidence that anyone ever discussed this matter with him.

[44] After Turner was discharged, he left Respondent's office and went to a gas station where he flagged down an ambulance operated by Kay Phillips and Cynthia Payne. As soon as Phillips and Payne stopped to talk to Turner, David Dinwiddie drove up. He screamed at Phillips and Payne to get back to headquarters and not to talk about union business on company time. Based on these facts, I find a violation of Sec. 8(a)(1) as alleged in complaint par. 5(pp)(ii). "An employer may . . . lawfully forbid employees to talk about a union during periods when the employees are supposed to be actively working, if that prohibition also extends to all other subjects not associated or connected with their work tasks." However, when the employer's rule, as promulgated or enforced, only forbids discussion of the union, but allows discussion of other nonwork-related subjects, the employer violates Sec. 8(a)(1), *Orval Kent Food Co.*, 278 NLRB 402, 407 (1986).

[45] For the same reasons that I conclude that Turner's discharge was discriminatory, I conclude that the two written warnings issued to him on March 4, 1999, violated the Act as alleged in complaint par. 6(w).

[46] The alleged violation is addressed in complaint paragraph 6(cc). Testimony regarding the incident appears at Tr. 511–516 (Phillips); 1124–1127 (Payne); and 1709–1713 (Dinwiddie).

at a Hardee's restaurant. Phillips objected on the grounds that the Hardee's bathroom was filthy.

I credit Dinwiddie's testimony that he denied the request because only one or two other ambulances were available to make runs over contrary testimony by Phillips and Payne. I do so because Phillips' testimony makes clear that the dispatcher denied their request even before she talked to Dinwiddie. I infer that the dispatcher would not have done so if some ambulances were not already on runs. There is no evidence as to whether Phillips and Payne renewed their request after more ambulances became available. I therefore am unable to conclude that Respondent denied the request to use the bathrooms in order to retaliate against Phillips and Payne and therefore will dismiss complaint paragraph 6(cc) with regard to this incident.

Phillips and Payne also allege that their requests to take a lunch break the same day were denied until late in the afternoon. Dinwiddie denies being aware of such denials. As there is no evidence that the crew's requests for lunch breaks were denied pursuant to instructions from Dinwiddie or other management officials, I will dismiss paragraph 6(cc) in its entirety.

Allegations Pertaining to Dennis Wade in Complaint Paragraph 6(dd)(iii)

Dennis Wade, an EMT, was an open union supporter and served as an observer for the Union during the February 24, 1999 election. For the schedule beginning March 14, a number of employees, particularly union supporters, were placed on different shifts than they had been working previously and were assigned different partners.

Wade, who had been working on an ALS unit with Scott Hedrick since May 1998, was assigned to a BLS unit, working with Mike Durbin. BLS work is generally regarded as less interesting and desirable than ALS assignments. On March 14, Wade and Durbin were given a bucket of wax and were told to use it to remove the Owensboro hospital logo from their ambulance. They tried unsuccessfully to remove this logo with rags for about 2 hours. Later, Respondent had its supervisors and other employees remove or partially remove these logos from several ambulances with a buffer. Wade was never assigned to this task again.

Despite the numerous unfair labor practices committed by Respondent, I decline to find that every unpleasant event or undesirable change in the working lives of union supporters was motivated by a desire to discriminate on the grounds of union activity. Specifically with regard to Dennis Wade, I find insufficient evidence of discriminatory motive with regard to the waxing assignment and therefore dismiss that portion of the complaint.

The Discharge of James Hardin

James Hardin began working as an EMT for Yellow in December 1997. He signed union authorization cards in July and September 1998, displayed union stickers on the window of his private vehicle and used pens and a coffee mug with the union logo on them at work.

As discussed previously, in December 1998, Hardin received an "oral" warning from Yellow for leaving trash and linen in his ambulance. Shortly before the election, Hardin, Brian Kendall, and Glenn Zogelman were told by Russ Walkosak that, "if you think things are bad around here now, they are going to get a lot worse . . . You all brought this on yourselves." Hardin served as a union observer for the first shift during the February 24, 1999 representation election.

During his employment with Yellow, Hardin had two accidents while driving his ambulance. The first occurred in January 1999. Hardin was assigned to pick up a patient at a hospital in Greenville, Kentucky, approximately 50 miles from Owensboro. On the way back to Owensboro during an ice storm, Hardin's ambulance slid sideways while approaching a previous accident, bumped a guardrail and other cars. Hardin and his partner called the Muhlenberg County ambulance service to pick up the patient and return the patient to the hospital. Several hours later Hardin was able to drive the ambulance back to Owensboro.

When he returned to the Yellow facility, Hardin filled out an incident report. A few days later he asked Russ Walkosak whether he was going to be held responsible for the accident. Walkosak told Hardin he would not be held responsible because the accident was weather-related.

On March 8, 1999, Hardin was leaving the parking lot of the Owensboro Hospital in his ambulance. His partner, James Dukes, was in the vehicle with him. Two parked ambulances obscured Hardin's vision and he ran into another vehicle coming from the other side of the parked ambulances inside the parking lot. The police report estimated Hardin's speed at between 5 and 7 miles per hour and concluded that the other vehicle had come to a stop just prior to the collision. The left front of Hardin's ambulance struck the right front corner of the other vehicle and pushed it sideways. Hardin put his ambulance in reverse gear and backed away from the other vehicle a few feet. His vehicle was not moved again before the police and a Yellow supervisor arrived on the scene. The police report concluded that damage to both vehicles was minor and Hardin completed his work shift with the same ambulance.[47]

When James Hardin finished his shift on March 8, he filled out a form entitled "Driver Statement" and turned it in to his supervisor (GC Exh 35). On his next shift Hardin was asked to complete another driver's statement. The second form he completed differs from the first in that it contains the following printed statement at the top:

> This form is to be completed and turned in to the Louisville Safety Officer on each accident/incident.

After hearing nothing about his accident for 11 days, Hardin was called into a meeting with Russ Walkosak and Bruce Nanney on March 19.[48] Walkosak told Hardin that the company

[47] At Tr. 1264, Respondent's counsel read a portion of unemployment insurance referee's decision to James Hardin, suggesting that the March 8 accident had resulted in $1600 of damage to Hardin's ambulance and $2400 to the other vehicle. In fact, that portion of the referee's decision (GC Exh. 40) refers to the January accident. I note, moreover, that even with regard to the January accident, the damage estimates are hearsay and are not, as far as I'm concerned, established facts.

[48] Dinwiddie testified that he was not at work on March 19, due to illness.

safety committee in Louisville had decided to fire him as the result of the January and March accidents.

Hardin told Walkosak that under Respondent's motor vehicle accident procedure and point system (R. Exh. 1), which he had received when he was hired, he had not been charged with a sufficient number of points to warrant termination. Walkosak's response was that the decision to terminate Hardin was made by the Louisville Safety Committee and/or Safety Director Robert Jones. He avoided answering Hardin's inquiries as to how termination could be justified under the point system.[49]

The point system is geared to Yellow's taxicab operation, but is also applicable to the Owensboro ambulance drivers. Indeed, Walkosak did not tell Hardin that it was inapplicable, he basically told Hardin that he didn't understand how it applied to his situation.[50] The accident procedure and point system specifies offenses for which a driver may be terminated: a motor vehicle felony and driving under the influence/driving while intoxicated; leaving the scene of an accident and failure to report an accident. Otherwise the policy states that once a driver has accumulated 40 or more points within a 2-year period, that driver will not be allowed to drive a Louisville transportation vehicle. However, drivers are to be offered the opportunity to reduce their accumulated points by attending a driver improvement class.

There is no evidence that this policy was applied to James Hardin. Indeed, there is no reliable evidence as to why Respondent discharged Hardin, apart for retaliation for his union activity. Sherman Hockenberry testified that he is a member of the Louisville safety committee and that he was a member in March 1999. Hockenberry testified that this safety committee meets approximately once a month. When asked the number of people on the safety committee in March and in November, Hockenberry testified that he believed there were five, rather than stating categorically that there were five members.

Hockenberry testified further that he attended a safety committee meeting in March 1999.[51] According to Hockenberry, this was the first meeting in a few months because the safety director, Robert Jones, was new. Hockenberry was not sure as to whether all the members of the safety committee were present at the meeting. He testified that Jones made the determination that Hardin was at fault in the January accident and that it was thus "chargeable."[52]

Despite Hockenberry's insistence that the January accident was a factor in Hardin's discharge, the only document relating to his termination does not mention it (R. Exh. 26). Moreover, I find Hockenberry's testimony on this issue generally incredible—even as to what he heard Safety Director Jones say. After describing Hardin's March accident as a "head-on collision," a characterization for which there is no support, Hockenberry testified that Jones had a great deal of concern about the differences between the first Hardin statement and the second.

Examination of these statements, (GC Exhs. 35 and 36), reveals no significant discrepancy. The second, executed at Respondent's insistence, is more detailed and may be inaccurate in stating that the other vehicle was moving when Hardin hit it. However, I simply do not believe that Respondent decided to terminate Hardin due to any difference between the two documents.

Hockenberry also testified that Jones felt that Hardin was trying to cover something up by moving his vehicle. I do not believe that Hockenberry heard Jones say any such thing in as much as there is no evidence to support such a conclusion. Indeed, there is no evidence that Hardin violated any company rule in moving his vehicle backwards, or that by doing so he compromised either the police investigation or Respondent's investigation in any way.[53]

Finally, Hockenberry testified that the safety committee agreed with Jones' recommendation that Hardin be terminated. Thus, the principal decision maker, according to Respondent, was Safety Director Jones, who it did not call as a witness. No adverse inference can be drawn from Yellow's failure to call Jones because he apparently left his employment with the company several weeks before the hearing in this matter, *Reno Hilton*, 326 NLRB 1421 fn. 1 (1998); *Goldsmith Motors Corp.*, 310 NLRB 1279 fn. 1 (1993). However, given that the General Counsel has made a prima facie case of discrimination under the *Wright Line* doctrine, the failure to produce the official responsible for Hardin's termination is crippling, if not fatal, to Respondent's case, *Christie Electric Corp.*, 284 NLRB 740, 784 fn. 137 (1987).

Respondent offered no explanation for its failure to call Robert Jones other than the fact that he left its employment a few weeks prior to November 2, 1999. This is a particularly unpersuasive reason for not calling him in as much as the unfair labor practice charge alleging that Respondent violated the Act in discharging Hardin was filed on March 26. Thus, Respondent appears to have had plenty of time to prepare its defense to this charge while Jones was still in its employ. I give no credence for Respondent's proffered explanation for the termination. Had it called Jones as a witness, he would, at a minimum, have had to explain how Hardin's termination was consistent with Respondent's motor vehicle accident procedures and point system.

Also contributing to my conclusion that Respondent's explanation is pretextual, are the irregularities concerning Respondent's Exhibit 26, a memorandum from Safety Director Jones

[49] GC Exh. 39 is a tape recording made by Hardin of the meeting at which he was terminated.

[50] David Dinwiddie also testified that the accident procedure and point system were in effect when he took over the Owensboro facility and that the safety committee assessed points against Respondent's drivers (Tr. 200).

[51] Hockenberry answered affirmatively to Respondent counsel's question as to whether he attended a March 24 safety committee meeting at which Hardin's accidents were discussed (Tr. 1850). Obviously, the committee could not have met to decide Hardin's fate on March 24, since Hardin was informed of his termination 5 days earlier.

[52] Walkosak, on the other hand, testified that he made the determination that the March accident was Hardin's second *chargeable* accident (Tr. 1581). There is absolutely no documentation that anyone in Respondent's management made such a determination. Hockenberry at Tr. 1853 testified that Jones relied on police reports of the first accident, which were not offered by Respondent.

[53] R. Exh. 1 instructs employees not to move their vehicle from the accident scene until instructed to do so by the police and/or safety department. Hardin did not move his vehicle from the accident scene.

to Paul Powell, purporting to transmit the findings of the accident review Board. The memo is dated March 24, 5 days after Walkosak terminated Hardin. Walkosak at the termination meeting on March 19, told Hardin that he had been informed by telephone of the safety committee's decision. However, Respondent waited until March 25, the day after the memo, to inform Kim Childers that she was being suspended in accordance with the findings of the safety committee. Leading me to even greater skepticism as to the innocence of the procedure followed in Hardin's case is the following exchange I had with Mr. Hockenberry:

> JUDGE AMCHAN: Is the recommendation of the Safety Committee final or does Mr. Powell have authority to impose a different punishment?
>
> THE WITNESS: It is only a recommendation committee. He has the authority to go higher or lower at his discretion.
>
> JUDGE AMCHAN: Who communicates the decision of the Safety Committee back to Owensboro?
>
> THE WITNESS: Mr. Powell would communicate that to me and I would communicate [with] them.
>
> JUDGE AMCHAN: And what happened in Mr. Hardin's case?
>
> THE WITNESS: I'm not sure if Mr. Powell communicated to me or if he had Mr. Jones to (sic) but it was communicated to me and then I communicated it with them.

Tr. 1875–1876.

The fact that Powell, who had the final decision making-authority, received a memo regarding the safety committee's deliberations 5 days after Hardin was fired, is one more factor, in the absence of a sufficient explanation, that convinces me that Respondent's explanation for his termination is pretext.

Finally, there is a strong indication that accidents involving Owensboro employees were only sent to the Louisville safety committee in conjunction with, or after the NLRB representation election. There is no documentary evidence that any accidents other than Hardin's March accident and Kim Childers' January accident were referred to this Committee. When Walkosak and Dinwiddie were asked for the names of other employees whose accidents were referred to the Louisville safety committee they could not name any (Tr. 1553, 1607). Renee McKinney backed an ambulance into the Yellow building on October 2, 1998, denting the vehicle. She was suspended for a week by Lisa Byers. There is no evidence that her accident was considered by the safety committee or safety director in Louisville.

Danny Jacobs ran off the road and into ditch while driving a Yellow ambulance in 1998, resulting in a dented fender. He submitted a report to the company safety director but does not know whether this accident was considered by the Louisville safety committee. There is absolutely no evidence that it was so considered. Jacobs was not disciplined for this accident.[54] Similarly, Mike Lawson, an ambulance driver who apparently never indicated support for the Union, backed into an abandoned car in January 1999. Although Walkosak testified that he called the safety director to recommend that Lawson only be sent to driver's school, there is no reliable evidence that Lawson's accident or incident was considered by the Louisville Safety Committee.[55]

I credit Childers' uncontradicted testimony that when she met with supervisor Bruce Nanney on January 30, 1999, he did not mention the Louisville safety committee to her or tell her that she would be disciplined by this committee for her accident. Moreover, I conclude, based on Childers' testimony, that the sentence fragment, "will send to Louisville Safety Director for further," was added to General Counsel's Exhibit 22 after January 30.[56]

James Hardin's discharge is the most obvious and blatant statutory violation in this case. The General Counsel established this violation by showing an advance indication of Respondent's intention to discharge union supporters, its extreme hostility to the Union, and the contrasting treatment accorded Hardin, on the one hand, and Mike Lawson and Daniel Jacobs, on the other. The violation is also supported by the suspicious delay in imposing any discipline for either accident, the departure from Respondent's established procedures, the numerous other unfair labor practices committed and the pretextual nature of Yellow's justification of the discharge.

The March 15, 1999 Written Warning Issued to Darrell Lancaster

On March 15, David Dinwiddie summoned Darrell Lancaster, an open supporter of the Union, into his office. Dinwiddie told Lancaster that an employee was resigning due to things Lancaster had said to the employee and that if this occurred again, Lancaster would be fired. Dinwiddie then gave Lancaster a written warning (GC Exh. 28), for publicly criticizing Respondent. There is no evidence in the record as to what Lancaster said to the employee, Ambulance Driver Michael Obenhausen (Tr. 1079–1083, 1694–1695).

Given the context of this case, it is fair to assume that Lancaster said something to Obenhausen that was critical of Respondent with regard to wages or working conditions. Unless his statements were "so offensive, defamatory or opprobrious" as to remove them from the protection of the Act, Respondent violated Section 8(a)(1) and (3) in disciplining Lancaster, *KBO,*

[54] Contrary to Walkosak's suggestion to the contrary at Tr. 1610–1611, Respondent's point system in R. Exh. 1 applies on its face to employees regardless of whether they are involved in an "accident" or "incident." R. Exh. 26 also states that in March the safety committee considered both accidents and incidents.

[55] Walkosak testified that Lawson was not disciplined other than being sent to driving school. The contrast in the discipline meted out to Hardin and Kim Childers, active union supporters, with the kid gloves treatment of Lawson and Jacobs also suggests pretext with regard to both Hardin and Childers. Childers, who was a union steward for a month during the organizing campaign, was suspended for 1 day and sent to driving school for an accident that is very similar to Lawson's.

[56] My conclusion in this regard is based in part on the fact that Nanney testified after Childers and was not asked about the circumstances under which Childers' accident was referred to the Louisville safety committee. Given the obvious irregularity in the procedure suggested by Childers' testimony, it was incumbent upon Respondent to explain how and when this occurred.

Inc., 315 NLRB 570 (1994).[57] As there is no evidence that this was the case, I find a violation as alleged in complaint paragraph 6(ii).

Respondent Violated Section 8(a)(1) and (3) in Suspending Kim Childers on March 25, 1999

As discussed previously, on January 30, 1999, EMT Kim Childers, an open union supporter, backed into another ambulance inside Respondent's facility. She should have had another employee act as a spotter when operating the vehicle in reverse. Supervisor Bruce Nanney told her that since there were no other incidents in his personnel file there would be no further action taken.

Almost 2 months later, David Dinwiddie called Childers into his office and suspended her for 1 day, purportedly for the January 30 accident. For a variety of reasons, I conclude that the suspension was imposed in retaliation for Childers' union activities and/or to restrain, coerce, and interfere with the Section 7 rights of Childers and other employees. First of all, the suspension is inconsistent with Respondent's accident procedures and point system. Under those procedures it appears that Childers would have been assessed only 10 points, as opposed to being suspended. Secondly, Respondent's disparate treatment of Childers, compared with Mike Lawson, who had a very similar accident at about the same time, also indicates discriminatory motive.[58]

The reasons advanced for Childers' suspension are pretextual for much the same reasons as I found the reasons for the Hardin discharge pretextual. There is no explanation for Respondent's change of heart from Nanney's statement that Childers would not be disciplined.[59] Moreover, the delay between Childers' accident and the suspension is highly suspicious—particularly in view of the Union's election victory in the interim. Moreover, there is no evidence as to the basis on which Respondent concluded that suspension was an appropriate punishment.

I have previously discussed the irregularity surrounding the referral of Childers' and Hardin's case to the Louisville safety committee. Assuming this committee met on their cases, its deliberations were infected by the desire of Jeff Mackin and/or Paul Powell to find whatever excuse it could to get rid of union supporters.

The Constructive Discharge of Vicky Belcher

Vicky Belcher began working as a part-time ambulance driver for Respondent in March 1998. She signed a union authorization card in November and indicated her support for the Union to her partner, Supervisor Brenda Thompson, in December. In April 1999, the Union filed unfair labor practice charge Case 25–CA–26532, which included an allegation that Supervisor Bruce Nanney wrote Vicky Belcher up for her union affiliation and/or concerted protected activity.[60]

Up until the schedule for the period ending May 15, 1999, Belcher had worked two 16-hour day shifts with 2 days in between. For the period beginning May 16, Belcher was scheduled in a more irregular pattern. She went to David Dinwiddie and told him that the new pattern created babysitting problems for her. Dinwiddie was unreceptive to her concerns but asked her if she wanted to become a full-time employee. Belcher asked him what hours would she be working; Dinwiddie said she would have to work whatever hours he deemed necessary.

After meeting with Dinwiddie, Belcher called him to ask why James Dukes, who was also a part-time employee, was still working the same hours as he had on previous schedules.[61] Dinwiddie refused to discuss Dukes' schedule with her. Belcher called Lisa Byers and told her that she would not accept full-time employment. Dukes also apparently declined full-time employment. Belcher was not listed on the schedule beginning June 6, 1999; neither was Dukes.

In July 1999, Dinwiddie asked Belcher to come to the Yellow facility to discuss her schedule. He declined to return her to the schedule that she worked prior to May 15. Belcher asked why James Dukes was working in accordance with his previous scheduling pattern. Dinwiddie again refused to discuss Dukes' schedule.

Beginning with the schedule starting July 18, James Dukes became a full-time employee working essentially the same schedule he had been working prior to May 15. His earlier work schedule had been Sunday and Saturday the first week of the schedule; Tuesday and Friday, the second week of the schedule and Monday and Thursday, the third week of the schedule. His new schedule differed from the old one, only in that he worked Sunday and Wednesday the first week of the schedule, instead of Sunday and Saturday. His workdays in the second and third weeks of the schedule were identical to old schedule (GC Exh 14).

Respondent's explanation for the disparate treatment of Dukes, for whom there is no evidence of union support, and Belcher, is that in May, Dinwiddie told part-time employees that they would have to commit to 36 hours a week in order to be full-time employees. Dinwiddie further testified that the day before Dukes accepted full-time employment, Tony Colletta, Yellow's human resource director, called him and told him that an employee only needed to work 32 hours a week to be considered full-time. I do not credit this testimony. For one thing,

[57] Respondent's handbook, cited by the Company in its warning to Lancaster, may also violate the Act if it purports to prohibit critical statements by employees that are not so offensive, defamatory or opprobrious as to remove them from protection of the Act, *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999); *Southern Maryland Hospital Center*, 293 NLRB 1209 (1989).

[58] R. Exh. 26 indicates that several other employees or lease-holding cab drivers also received 1-day suspensions for accidents similar to Childers' accident. However, the document is hearsay with regard to establishing the reasons for the discipline imposed on all the employees listed on it. Moreover, in the absence of first-hand testimony explaining how R-26 is consistent with R. Exh. 1, I conclude that R. Exh. 26 has no probative value with regard to establishing a nondiscriminatory motive in suspending Childers. For one thing, it is possible that a suspension could be justified for other employees, who may have had previous accidents, but could not be justified for Childers.

[59] In this regard, Russ Walkosak testified that he "probably would have forwarded the information [regarding Childers' accident] to Louisville" (Tr. 1584). There is no evidence as to when this occurred.

[60] This allegation is not contained in the complaint.

[61] Dukes has a full-time job which limits his availability to work for Respondent.

Respondent's counsel never asked Belcher if she had been told that 36 hours was a prerequisite for full-time employment. Secondly, there is no evidence that Dinwiddie informed Belcher in July that she could be a full-time employee if she was willing to work 32 hours a week.[62]

I conclude that Respondent constructively discharged Vicky Belcher by refusing to return her to her previous schedule, by taking her off its work schedule because she did not accept full-time employment and by failing to offer her full-time employment on the same terms as James Dukes. I draw this inference from the disparate treatment of Belcher, compared to Dukes, together with the evidence indicating the lengths to which Respondent was willing to go to rid itself of union supporters.

The fact that Dukes, apparently not a union supporter, also suffered a loss of wages, does not negate a finding that Respondent acted out of antiunion animus towards Belcher. I have considered Dukes' fate in light of all the other unfair labor practices committed by Respondent, the unfair labor practice charge filed on Belcher's behalf, and the convenient discovery that Dukes could be a full-time employee while working the schedule he had worked as a part-time employee. In this light, I conclude the loss of work and wages suffered by Dukes was intended to mask Respondent's unlawful conduct with regard to Belcher, *Heartland of Lansing Nursing Home*, 307 NLRB 152–153 (1992).

The June 1, 1999 Discharge of Roger Brumley

Paramedic Roger Brumley and his wife, Amy, had union stickers on their private vehicles for a short time in December 1998, until they were advised by Russ Walkosak that they should remove them. After the Union's election victory, in March or April 1999, they put union stickers back on the vehicles. However, on February 24, Roger and Amy Brumley were Union observers at the ballot counting. In April 1999, Brumley was elected union shop steward; it is unclear as to whether Respondent was aware of this prior to his discharge.[63]

At 11:30 p.m. on May 30, 1999, Brumley and his partner, EMT Kim Childers returned to Respondent's facility at the end of their shift. They then proceeded to the dispatcher's office to get the times and mileage for their ambulance runs. Each had separate information to obtain, which they used to enter onto an official report.

Most often the dispatcher has a card with the relevant information. On May 30, the dispatcher, Holly Hill, had a card for Childers but not for Brumley. He proceeded to enter the dispatch office through an open door, sat down at one of the three computers for 3—5 minutes and obtained his times and mileage.[64] Neither Hill nor Jerry Bradley, who was also in the dispatch office, made any attempt to prevent him from doing this or said anything to him about it.[65]

On June 1, Brumley was summoned to a meeting with David Dinwiddie and other supervisors. Dinwiddie said Brumley had been seen with another employee's run report. Brumley denied having anyone else's report.[66] Then Dinwiddie asked Brumley if he had touched the computer in the dispatch office. Brumley said he did and Dinwiddie told him he was fired.

Above the door to the dispatch office was a sign reading "Restricted Area." Prior to May 30, employees were told that only supervisors and dispatchers were allowed in the dispatch office. A memo may also have been circulated to this effect. However, this rule was never, or almost never, enforced. Employees, who were neither dispatchers nor supervisors, routinely entered the dispatch office (e.g., see Tr. 1664–1665). When some of the dispatchers wanted to take a bathroom break, they would ask a rank-and-file employee to watch the dispatch office for them.

Even after a "Restricted Area" sign was posted over the dispatch office door, employees had to enter the dispatch area to get equipment. In April 1999, Dinwiddie took the equipment out of the dispatch area and put up a new sign. However, nonauthorized employees continued to routinely enter the dispatch area. According to Dinwiddie, the problem is "quite a bit better. It's still an issue we're constantly addressing" (Tr. 1666).

Dinwiddie asserts that he has told supervisors that they could be disciplined for allowing unauthorized employees to use the computer. However, there is no evidence that he has done so, even with regard to Jerry Bradley, who was present when Brumley entered the dispatch office on May 30, and either was a supervisor or was himself unauthorized to be in the office. Although there is no evidence that Respondent knew of other nonauthorized employees who used the dispatch computer, there is also no evidence that Respondent ever communicated to rank and file employees that this was a serious violation of company policy.

To the contrary, employees were constantly receiving mixed messages from Respondent regarding the sanctity of the dispatch office. Daniel Jacobs' memorandum of his comments to employees on November 25, 1998, several months *after* he had posted a restricted area sign over the door of the dispatch office, states:

> Congregating needs to stop in the communications center and the accounting office. Employees are to go into dispatch to get their radio, keys, *or other information needed* and immediately exit . . . [emphasis added]. R. Exh. 26.[67]

[62] In July, Belcher provided Dinwiddie with the list of days for which she was available to work for Yellow in August and September. The pattern on this list is very similar to the schedule she worked prior to May 15 (R Exh. 6). Through August 20, however, her list indicates availability only for 7-1/2-hour blocks due to prior commitments to another job.

[63] At some point after the election, a list of union officers was posted on a bulletin board at Respondent's headquarters; it is not clear when this occurred (Tr. 860).

[64] The computers were already on. Brumley did not have a password to start them up.

[65] Bradley may have been an assistant supervisor at the time. It has not been established whether or not he was authorized to be in the dispatch office.

[66] GC Exh. 58, a May 30 incident report from Holly Hill, indicates that Dinwiddie had no grounds for this accusation.

[67] These notes were posted at Respondent's facility for employees to read and were distributed to employees who were unable to attend the meeting.

I conclude that the General Counsel has established a prima facie case of discriminatory discharge with regard to Roger Brumley and that Respondent has not met it burden that his discharge would not have occurred absent his union activity. Given Respondent's stated intention of getting rid of union supporters and its demonstrated willingness to use virtually any excuse to do so, I infer that union activity was at least a significant factor in the decision to terminate Brumley. Additionally, Respondent was aware that nonauthorized employees routinely entered the dispatch office and with the exception of Brumley, apparently didn't discipline anyone for violating its rules.

Moreover, in the absence of evidence that Respondent make it clear to employees that it considered it a serious violation of its rules for an employee to get his or her times and mileage off the computer, I conclude that it had a discriminatory motive in firing Brumley. Indeed, Brumley's conduct appears to be consistent, or at least not inconsistent, with the instructions in Jacobs' November 1998 memorandum.

Additional Allegations with Regard to Amy Brumley: (Complaint Pars. 6(rr) and (ss))

Amy Brumley sustained a work-related injury in March 1999. She was put on light duty by a physician. However, she did not work for 5 weeks because Respondent contends that no light duty work was available for her. Brumley returned to work on April 27. At this time she presented Respondent with her physician's statement that she was able to return to her former duties. Respondent did not challenge her entitlement to work, and she did so without objection for 5 weeks.

On June 2, the morning after Respondent fired her husband, Amy Brumley was handed a form by Office Manager Debbie McDaniel and was told to sign it. The form (GC Exh. 47), is entitled "Workers' Compensation Agreement and Stipulation." Brumley was asked to confirm that she had "fully and completely resolved" from her March 25 injuries and that she was able to perform her duties. The form also stated that she "released Respondent as a result of her injuries." McDaniel told Brumley that she had received a call "from Louisville" informing her that Brumley should have signed this document when she returned to work.

Brumley said she was not comfortable signing the document and that she wanted to take it to the State of Kentucky workers compensation office for review. McDaniel then took the form into David Dinwiddie's office. Shortly thereafter, Bruce Nanney came out of Dinwiddie's office and told Brumley that Dinwiddie had decided that she would pick up trash outside of Respondent's offices rather than take a nursing home patient to Bowling Green, Kentucky, as previously scheduled. Amy Brumley picked up trash and cleaned restrooms until she left work for a previously scheduled dentist's appointment at noon.

The next morning, June 3, McDaniel informed Brumley that she had been told by Paul Powell, that Brumley could not work until she signed the workers compensation release. Brumley left and took the form to the workers compensation office for review. The Owensboro workers compensation office sent the form to headquarters in Frankfort. On Saturday night, June 5, Supervisor Terry Dossett called Brumely and told her she could not work her shift scheduled for the next day unless she signed the form. Brumley did not work Sunday.

On Monday, Brumley called David Dinwiddie to question why Respondent was demanding that she sign the form after it allowed her to work for 5 weeks without it. Dinwiddie called her back, told her that this was a longstanding procedure, that others signed the form and then hung up on Brumley.

On Wednesday, June 9, Dispatch Supervisor Lisa Byers called Amy Brumley and told her that Respondent needed her to come into work on Thursday. Brumley asked Byers about the workers compensation form and told her that she was still not comfortable signing it. Byers told her that "I was told that, if you asked about it, you don't have to sign that thing now" (Tr.1459). Amy Brumley returned to work on Thursday morning.

I conclude that the General Counsel has established a prima facie case of discrimination. From the timing of both alleged violations, on the day after Respondent unlawfully fired Roger Brumley, I infer that Respondent was attempting to encourage Amy Brumley to quit or react in a way that would give it an excuse to fire her.

I find Respondent's explanation of its refusal to allow Brumley to work to be completely incredible. I do not believe that after 5 weeks, it suddenly discovered that Brumley had not signed this form on June 2, and that she could not work without it. Despite Dinwiddie's bald assertions that others had signed the form, Respondent did not introduce any such forms, and failed to establish that as fact. Yellow's explanation for why it discovered after a week that Brumley could work without signing the form is also incredible. I conclude that Respondent violated the Act as alleged in complaint paragraphs 6(rr) and (ss).

Summary of Conclusions of Law

The complaint alleges over 50 8(a)(1) violations and a similar number of 8(a)(3) and (1) violations. There are also more than 15 8(a)(5) allegations. Some of these allegations are duplicative and some of them appear to have been abandoned, either by virtue of the fact that there is no evidence in the record to support them or because they were not argued in the briefs. Additionally, there are a number of allegations, which are rather tangential to the case, for which I conclude the evidence is not sufficiently credible to find a violation.

A. With regard to the 8(a)(1) violations in paragraph 5:

1. 5(a) is dismissed on the grounds that I decline to conclude that Russ Walkosak's interrogation of Chris Embry was coercive.

2. 5(b) is dismissed because the evidence supporting it is insufficiently credible.

3. 5(c) is affirmed because Lisa Byers' remarks to Richard Turner violate the Act regardless of their friendly intent.

4. 5(d) referring to Walkosak's initial inquiry to employees regarding the Union is affirmed.

5. 5(e) regarding Walkosak's discussions with Norman Byers and Kay Philips in their ambulance is affirmed.

6. 5(f) is dismissed.

7. 5(g) is dismissed.

8. 5(h) is affirmed for the same reasons as 5(c).

9. 5(i) regarding Daniel Jacobs' comments to Norman Byers' about Kay Phillips being a troublemaker is affirmed.

10. 5(j) is dismissed.
11. 5(k) is dismissed.
12. 5(l) is dismissed.
13. 5(m) is dismissed.
14. 5(n) is dismissed.
15. 5(o), regarding Bruce Nanney's discussion with James Hardin about all warnings now being is writing, is affirmed.
16. 5(p) is dismissed.
17. 5(q), regarding Nanney's discussions with Cynthia Payne regarding "no more oral warnings," is affirmed.
18. 5(r), regarding James Hardin's tape recorded conversations with Sherman Hockenberry, about documenting all disciplinary actions, is affirmed.
19. 5(s) is dismissed.
20. 5(t)(i) and (iii), regarding Walkosak's discussions with the Brumleys, is affirmed. 5(t)(ii) is dismissed.
21. 5(u), regarding Walkosak's discussions with Chris Embry after Embry had been fired, are affirmed.
22. 5(v), based on Jacobs' conversation with James Hardin regarding surveillance by Russ Walkosak, is affirmed.
23. 5(w) is dismissed.
24. 5(x), predicated on Walkosak's discussions with Brian Kendall, is affirmed.
25. 5(y) is dismissed.
26. 5(z) is dismissed.
27. 5(aa), predicated on conversations between Walkosak and Jeffrey James, and between David Dinwiddie and Jeffrey James, is affirmed.
28. 5(bb) is dismissed.
29. 5(cc) is dismissed.
30. 5(dd)(ii), predicated on Brenda Thompson's discussion with Vickie Belcher, is affirmed. 5(dd)(i) is dismissed.
31. 5(ee) is dismissed.
32. 5(ff) is dismissed.
33. 5(gg), based on Walkosak's statements regarding Renee McKinney's union pen, is affirmed.
34. 5(hh), based on a discussion between Russ Walkosak and James Hardin, Brian Kendall, and Glen Zogelman is affirmed.
35. 5(ii), based on a discussion between Walkosak and Brian Kendall, is affirmed.
36. 5(jj) is dismissed.
37. 5(kk), based on Walkosak's refusal to allow Renee McKinney, to vote in the representation election, after she had been unlawfully discharged, is affirmed.
38. 5(ll) is dismissed.
39. 5(mm)(i) is affirmed. 5(mm)(ii) is dismissed.
40. 5(nn)(i) regarding Jason Tierney's discussion with Richard Turner about the union victory is affirmed. 5(nn)(ii) is dismissed for the same reasons as paragraph 6(m).
41. 5(oo) is dismissed.
42. 5(pp)(i) is dismissed. 5(pp)(ii) is affirmed as discussed in a footnote to the discussion of Richard Turner's discharge.
43. 5(qq) is dismissed.
44. 5(rr) is dismissed. For one thing, there is no credible evidence that Respondent ever used seniority in making work assignments.
45. 5(ss)(i), regarding David Dinwiddie's discussion of wages with Nancy Baker, is affirmed. 5(ss)(ii) is dismissed.
46. 5(tt) is dismissed.
47. 5(uu) is dismissed.
48. 5(vv) is affirmed based on David Dinwiddie's March 15, 1999 threat of discharge to Darrell Lancaster.
49. 5(ww), based on Dinwiddie's discussion of wages with Kurt Stumpf, is affirmed.
50. 5(xx) is dismissed.
51. 5(yy) is dismissed.
52. 5(zzz) is dismissed.
53. 5(aaa) is dismissed.
54. 5(bbb) is dismissed as being duplicative of 6(ss), which is affirmed.

B. With regard to the 8(a)(3) and (1) violations alleged in paragraph 6 of the complaint, they are all affirmed as discussed herein, except for the following: subparagraphs 6(b), (f), (m), (o), (v), (z), (aa), (bb), (cc), (dd)(iii), (ee), (ll)(ii), and (mm).

C. With regard to the 8(a)(5) and (1) violations alleged in paragraph 7 of the complaint.

1. 7(e) is duplicative of 6(r), which has been affirmed. 7(e) is dismissed because it is unnecessary to decide whether Respondent's policy also violated Section 8(a)(5).
2. 7(f) is dismissed as these assignments were made before the Union became the bargaining representative of Respondent's employees.
3. 7(g) is dismissed. It is duplicative of 6(f) which has been affirmed and it is therefore unnecessary to determine whether Respondent also violated Section 8(a)(5).
4. 7(h) is dismissed for the reasons set forth above; it is duplicative of 6(u), which has been affirmed.
5. 7(i) is duplicative of 6(v) which has also been dismissed. The General Counsel has not established a unilateral change of policy following the election.
6. 7(j) is affirmed, even though it is duplicative of 6(y) because the unilateral implementation of a new dress code after the election clearly violates Section 8(a)(5).
7. 7(k) is dismissed because the General Counsel failed to establish that seniority was ever used by Respondent to determine shift, partner and work assignments.
8. 7(l) is duplicative of paragraph 6(dd), which has been affirmed as an 8(a)(3) and (1) violation. The General Counsel has not established an 8(a)(5) violation as well.
9. 7(m) is dismissed for the same reasons; it is duplicative of 6(pp).
10. 7(n) is dismissed for the same reasons; it is duplicative of 6(ff).
11. 7(o) is dismissed; it is duplicative of 6(hh).
12. 7(p) is dismissed; an 8(a)(5) violation has not been established.
13. 7(q) is dismissed due to a lack of convincing evidence.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly

basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Because of the Respondent's egregious and widespread misconduct, demonstrating a general disregard for the employees' fundamental rights I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

[Recommended Order omitted from publication.]